TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 84

JESSE TURNER, APPELLANT,

vs.

CITY OF MEMPHIS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

FILED MAY 1, 1961
JURISDICTION POSTPONED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 84

JESSE TURNER, APPELLANT,

vs.

CITY OF MEMPHIS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

INDEX

	Original	Print
Record from the United States District Court for the Western District of Tennessee		
Complaint	1	1
Answer of defendant, City of Memphis	6	5
Attachment—Lease dated April 21, 1953 between City of Memphis and Dobbs Houses, Incorporated	9	8
Answer of defendant, W. S. Haverfield	19	18
Answer of defendant, Dobbs Houses, Inc.	20	18
Motion of plaintiff for summary judgment	24	21
Plaintiff's affidavit in support of motion for summary judgment	27	23
Transcript of proceedings—June 3, 1960	29	24
Appearances	30	25
Argument of Mrs. Motley	34	26
Argument of Mr. Gianotti	40	30
Colloquy between Court and counsel	44	32
Oral on ruling for three-judge court	50	35

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 31, 1961

	Original	Print
Record from the United States District Court for the Western District of Tennessee—Continued		
Motion for summary judgment	53	36
Order allowing Dobbs Houses, Inc., to amend answer	56	38
Transcript of proceedings—June 27, 1960	58	39
Appearances	59	40
Colloquy between Court and counsel	61	40
Notice of trial date	73	47
Motion to amend answer of Dobbs Houses, Inc., and rule on motion in Chambers	74	48
Notice of Motion	76	49
Motion to amend answer and rule on motion in Chambers	77	50
Order allowing City of Memphis to amend answer	79	51
Order allowing Dobbs Houses, Inc., to amend answer	80	52
Transcript of proceedings—November 9, 1960	82	53
Appearances	83	54
Colloquy between Court and counsel	84	54
Testimony of Jesse Turner—direct	87	56
Charlie Wade Crutchfield	90	58
Argument of Mr. Giannoti	97	62
Argument by Mr. Heiskell	112	70
Argument by Mrs. Motley	114	71
Further argument by Mr. Giannoti	135	82
Further argument by Mrs. Motley	143	86
Opinion, per curiam	147	87
Order holding cause in abeyance pending state court action	151	89
Notice of appeal to the Supreme Court of the United States	152	90
Clerk's certificate (omitted in printing)	155	92
Order postponing jurisdiction	156	92

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE MEMPHIS DIVISION

Civil Action No. 3934

JESSE TURNER, Plaintiff,

v.

CITY OF MEMPHIS, a municipal corporation chartered under the laws of the State of Tennessee and DOBBS HOUSES, INC., a corporation organized and existing under the laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc. Restaurant in the Memphis Municipal Airport, Defendants.

COMPLAINT—Filed April 1, 1960

1. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1343(3). This action is authorized by Title 42, United States Code, Section 1983 to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution and laws of the United States or by any act of Congress providing for equal rights of citizens. The rights, privileges and immunities sought to be secured in this action are rights, privileges and immunities guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by the provisions of Title 42, United States Code, §§1981 and 1983, as hereinafter more fully appears.

[fol. 2] II. This is a proceeding for a permanent injunction enjoining defendants, and each of them, their agents,

employees, and successors, and all persons in active concert and participation with them from continuing to segregate the plaintiff, and all other persons similarly situated, in the various facilities located within the Memphis Municipal Airport, as hereinafter more fully appears.

III. Plaintiff brings this action pursuant to Rule 23 (a)(3) of the Federal Rules of Civil Procedure for himself and on behalf of all other Negroes similarly situated who are likewise affected by the policy, practice, custom and usage of the defendants which is complained of herein. The plaintiff and the members of his class are so numerous as to make it impracticable to bring them all before the court, but there are common questions of law and fact involved, common grievances arising out of common wrongs, and a common relief is sought for the plaintiff and for each member of his class. The plaintiff fairly and adequately represents the interests of the class on behalf of which he sues.

IV. Plaintiff, Jesse H. Turner, is an adult Negro resident of the City of Memphis, a citizen of the State of Tennessee and a citizen of the United States. He was denied service in the main dining room of the Dobbs Houses Restaurant located in the Memphis Municipal Airport by defendants, solely because of his race and color, pursuant to the policy, practice, custom and usage of defendants in segregating Negroes within said airport.

V. (a) Defendant, City of Memphis, is a municipal corporation in Shelby County, Tennessee. Said defendant is bound by the terms of a lease entered into by it whereby a portion of the area comprising the Memphis Municipal Airport has been leased to defendant Dobbs Houses, Inc. for the express purpose of, among other things, operating a restaurant in the Municipal Airport. The airport is owned and operated by the defendant, City of Memphis.

(b) Defendant Dobbs Houses, Inc. is a corporation chartered under the laws of the State of Tennessee and is the lessee of portions of the Memphis Municipal Airport, subject to the terms of the lease executed by and between J. K.

Dobbs as president of Dobbs Houses, Inc. and the City of Memphis which provides, in part, as follows:

> [fol. 3] The premises herein leased shall, during the term of this lease, be used by Lessee only and exclusively for lawful purposes, and no part of the premises shall be used in any manner whatsoever for any purposes in violation of the laws of the United States, the State of Tennessee, or the ordinances, rules and regulations of the City of Memphis, or ordinances, rules and regulations which the City of Memphis has or may promulgate for the efficient management, control and operation of said Memphis Municipal Airport. (Paragraph 20)

VI. On April 28, 1959, Plaintiff Jesse H. Turner and two business associates entered the Dobbs Houses Restaurant in the Memphis Municipal Airport and were refused service in the main part of the dining room solely on account of their race and color. Upon entering the Dobbs Houses Restaurant, Plaintiff Turner was stopped by a hostess and directed by her to a small room reserved for Negroes adjacent to the main dining room. Upon requesting to see the manager, plaintiff was met by defendant W. S. Haverfield, who identified himself as the manager and stated that Negroes were not served in the main dining room but in a smaller area reserved for them. Plaintiff declined the invitation to be served in the small room reserved for Negroes.

VII. Plaintiff alleges that acting under color of their authority and under color of the laws of the State of Tennessee and the ordinances of the City of Memphis, Tennessee, defendants herein have adopted and presently pursue a policy, practice, custom and usage of segregating Negroes and white persons in certain of the airport's facilities. With respect to the service of food, defendants serve white persons only in the main dining room of the Dobbs Houses Restaurant in the Memphis Municipal Airport and serve Negroes in a separate room solely because they are Negroes. Defendant City of Memphis has also required

racial segregation in said airport with respect to rest room facilities.

VIII. Plaintiffs and those similarly situated have suffered and shall continue to suffer irreparable injury by acts herein complained of unless enjoined by this court. They have no plain, adequate or complete remedy to redress these wrongs other than this suit for an injunction. Any other remedy would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience, not only to the plaintiff and those similarly situated, but to defendant City of Memphis as a governmental agency.

[fol. 4] Wherefore, plaintiff respectfully prays that this court will advance this cause on its docket and order a speedy hearing of same and after such hearing enter a permanent injunction enjoining defendants and each of them, their agents, employees and successors and all persons in active concert and participation with them, from making any distinctions based upon race or color in regard to service at the Memphis Municipal Airport and as to service in the Dobbs Houses Restaurant located therein or as to any other restaurant or any other public facilities located in the Memphis Municipal Airport. Plaintiff prays that the court will allow him his costs herein and will grant him such other, further or additional relief as may appear to the court to be equitable and just.

A. W. Willis, Jr., Attorney for Plaintiff, 588 Vance Avenue, Memphis, Tennessee.
R. B. Sugarmon, Jr., Attorney for Plaintiff, 588 Vance Avenue, Memphis, Tennessee.
H. T. Lockard, Attorney for Plaintiff, 322½ Beale Street, Memphis, Tennessee.
B. L. Hooks, Attorney for Plaintiff, 588 Vance Avenue, Memphis, Tennessee.
B. F. Jones, Attorney for Plaintiff, 211 South Third Street, Memphis, Tennessee.
I. H. Murphy, Attorney for Plaintiff, 588 Vance Avenue, Memphis, Tennessee.

[fol. 5] Constance Baker Motley, Attorney for Plaintiff, Suite 1790, 10 Columbus Circle, New York 19, New York.

Thurgood Marshall, Attorney for Plaintiff, Suite 1790, 10 Columbus Circle, New York 19, New York.

[fol. 6] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

ANSWER OF DEFENDANT, CITY OF MEMPHIS—
Filed April 21, 1960

First Defense

Plaintiff has failed to state a claim against this defendant upon which relief can be granted.

Second Defense

This defendant admits that it is a municipal corporation in Shelby County, Tennessee, and it admits that it is bound by the terms of the lease referred to in Paragraph V(a) of the complaint, and a copy of the said lease is attached hereto as an exhibit, but the other allegations of fact contained in the complaint, except those explicitly admitted hereinafter, are denied. This defendant admits that it does maintain separate facilities for the Negro and white races at the Memphis Municipal Airport, and it avers that the maintenance of separate rest rooms is required by certain city ordinances contained in the Memphis Municipal Code enacted in 1949, and in full force and effect on the date of the commencement of this action by the plaintiff. Those sections of the Memphis Municipal Code to which this defendant refers are as follows:

"*Section 151.26. Police Powers.* All the powers of the police officers of the city, derived from whatever source, are hereby extended to the area embraced within the Memphis Municipal airport as the same now exists, or as the same may be hereafter established.

Section 151.27. Disorderly, etc., conduct. No person shall commit any disorderly, obscene, indecent or unlawful act, or commit any nuisance on the airport.

Section 151.40. Violation of regulations; misdemeanors. Any person operating or handling any vehicle, [fol. 7] equipment, or apparatus or using the airport or any of its facilities in violation of this chapter, or refusing to comply herewith, may be removed from the airport, and deprived of and refused the further use of the airport and its facilities for such length of time as may be determined by the airport manager.

Any offense declared to be a misdemeanor by ordinance of the city shall be a misdemeanor if committed on the Memphis municipal airport, and shall be punishable as provided by the ordinances of the city pertaining to such violation.

Section 3044.29. General requirements for water closets, urinals and lavatories in all buildings other than one- and two-family dwellings and multi-family dwelling units. In all buildings other than one- and two-family dwellings and multi-family dwelling units, there shall be one or more water closets in conformity with the general requirements of this section, together with the required number of urinals and lavatories according to the occupancy, as provided in the following sections. The lavatories shall be in an ante-room or compartment when more than one commode or urinal is required, or provided. The space provided for each fixture and other details shall be as required in Section 3044.27.

* * * * * * *

(d) *Separate facilities required for white and black races and for both sexes.* Where buildings are used by both white and the black races, separate facilities shall be provided for each race, and separate facili-

ties shall be provided for both sexes of each race, where both men and women use any such building."

* * * * * * *

Third Defense

This defendant avers that the restaurant operated by defendant, Dobbs Houses, Inc., at the airport terminal building, is a private facility operated in space leased from the city under the aforesaid lease exhibited hereto. This defendant avers that there is in existence a valid and constitutional statute of the State of Tennessee, Section 53-2121 of the Tennessee Code, which provides that regulations governing the operation of restaurants shall be issued by the division of hotel and restaurant inspection of the State of Tennessee, and the violation of any such regulation is a misdemeanor under Tennessee Code Section 53-2120. Pursuant to said statute, said commissioner has issued Regulation No. R-18(1), which is as follows:

"Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises."

[fol. 8] Until and unless the above cited regulation shall have been declared unconstitutional by a court of competent jurisdiction and of final review, the officials of the City of Memphis conceive it to be their duty to object to desegregation of the races by the defendant, Dobbs Houses, Inc., in the airport restaurant, as a violation of the laws of the State of Tennessee, and, therefore, a violation of paragraph 26 of its lease with the city.

Fourth Defense

This defendant avers that even if the above cited regulation of the State of Tennessee should be voided, Dobbs Houses, Inc., operates the restaurant at the Memphis Mu-

nicipal Airport as a private facility, to which the 14th Amendment does not apply, and the operator has the legal right to enforce any rules and policies which it deems desirable in regard to the seating of patrons, including the right to seat and serve patrons in separate areas because of race or color. This defendant, as above stated, is advised that Dobbs Houses, Inc., does maintain separate eating areas for the Negro and white races in its dining room.

Wherefore, this defendant denies that the complainant is entitled to any relief against this defendant by way of injunction or otherwise, and this defendant further avers that even if plaintiff is entitled to relief on other grounds, it cannot be granted unless the hereinabove cited regulation issued by the division of hotel and restaurant inspection of the State of Tennessee is voided for unconstitutionality by a three judge court, and after due notice to the Governor and Attorney-General of the State of Tennessee, pursuant to provisions of Sections 2281 and 2284, Title 28, of the United States Code.

Frank Gianotti, Commerce Title Building, Memphis, Tenn.; Albert C. Rickey, Columbian Mutual Tower, Memphis 3, Tenn., Attorneys for Defendant, City of Memphis.

Certificate of Service (omitted in printing).

[fol. 9]

EXHIBIT TO ANSWER

LEASE

THIS INDENTURE Made this the 21st day of April, 1953, by and between the City of Memphis, a municipal corporation existing under and by virtue of the laws of the State of Tennessee, hereinafter referred to as the Lessor, and Dobbs Houses, Incorporated, a corporation organized under the laws of the State of Tennessee, of Memphis, Tennessee, hereinafter referred to as the Lessee.

WITNESSETH:

The parties hereto, for the considerations hereinafter mentioned, covenant and agree, as follows:

1. The Lessor hereby leases to the Lessee the following described space at the Memphis Municipal Airport in Shelby County, Tennessee:

(1) The same premises in the Terminal Building as are now occupied by the Lessee for its restaurant.

(2) The same premises as are now occupied in the lobby of the Terminal Building or such other space as may hereafter be allocated by the Manager of the Municipal Airport to Lessee for use as a snack bar in said lobby.

(3) The space occupied by Lessee in Hangar No. 2 for use as a catering kitchen.

It is understood that the Lessor contemplates as soon as funds are available therefor for construction of an entirely new Administration Building, in which it expects to provide for restaurant facilities. It is agreed, that if such new Administration Building shall become ready for occupancy by a restaurant during the term of this lease, or any renewal thereof, that this lease may be terminated at the option of the Lessor upon 30 days notice.

2. TO HAVE AND TO HOLD the above described premises unto the Lessee for the period of three years, beginning on the 1st day of May, 1953, and ending on April 30, 1956.

[fol. 10] 3. Lessee agrees to conduct a first-class cafe and to sell only such articles and wares as are sanitary, wholesome and clean and of the highest character, and agrees not to charge prices higher than those prevailing in the City of Memphis for the same articles. All novelties to be sold upon said premises must first be approved by the Lessor, or its authorized agent.

4. Lessee agrees to operate said cafe twenty-four hours each day; and Lessee agrees to prepare meals for any and all airlines for service to their passengers and employees

on aircraft at such prices as shall mutually be agreed upon by the airlines involved and the Lessee, with the limitation that in the event the said airline companies, or any one of them, and the Lessee fails to come to a mutual agreement, the said company or companies shall have the privilege of securing such service elsewhere, provided that such service can be secured for at least fifteen percent (15%) less than the price of the service offered by the Lessee.

5. Lessee agrees neither to suffer nor permit the sale of alcoholic beverages of any kind on said premises, and will prohibit the use by patrons of alcohol at all times in said cafe and on said premises.

6. The Lessee shall make available, for sale, to persons on the said Memphis Municipal Airport, such soft drinks and confections as the Manager of the Memphis Municipal Airport may deem necessary and proper.

7. The Lessor grants to the Lessee the exclusive right to sell food, beverages, cigarettes, tobacco, magazines, periodicals, novelties and other similar products at the Memphis Municipal Airport, subject to the right of the Chicago & Southern Air-Lines, Incorporated, to operate a restaurant pursuant to the terms of a lease contract between the Chicago and Southern Airlines, Incorporated, and the City of Memphis, dated June 7, 1940, which con-[fol. 11] tains the following provisions and grant:

"The right to install, maintain and operate in the office building a cafeteria, restaurant or other food and beverage preparing and dispensing establishment and the right to cook, prepare and serve therein foods, victuals and beverages, excluding all alcoholic beverages, for consumption and use by lessees, employees, guests, passengers and invitees, together with the right to cook and prepare such foods, etc., for consumption, for use by lessees, passengers, employees and guests on its aircraft in flight operation into or from said Airport and to do all things necessary required or convenient in connection therewith. Lessee agrees to observe all laws, ordinances, rules and regulations, promulgated

by proper governmental authorities regulating food establishments."

Also, subject to the agreement between the City of Memphis and the United States Government that a restaurant for the serving of meals to the Government Personnel only on the property occupied by the U. S. Army on the grounds leased to them by the City of Memphis.

8. Lessee agrees to indemnify, save and hold harmless, the said Lessor from and against all claims and actions, and all expenses incidental to the investigation and defense thereof, based upon or arising out of damages or injuries to person or property, caused by the fault or negligence of Lessee, its agents or employees, or arising out of the conduct of Lessee's business, or arising out of the use or occupancy of the said leased premises by Lessee, provided, however, that Lessee shall not be liable for any injury or damage or loss occasioned by the negligence of Lessor, its agents, or employees; Lessor shall give to Lessee prompt and reasonable notice of any such claims, actions, or suits. Lessee agrees to carry and keep in force public liability insurance covering personal injury and property damages, and such other insurance as may be necessary to protect Lessor from such claims and actions aforesaid.

[fol. 12] 9. The Lessee agrees that the prices charged for food and drinks sold or offered for sale to the public on said premises by the Lessee shall be publicly displayed at all times on appropriate bulletin boards or placards, and also listed in menu cards always available to the public.

10. The Lessee hereby covenants and agrees to pay to the Lessor a sum equal to six percent (6%) of the gross sales of all food and other merchandise sold on the premises herein demised and through concessions herein granted, except articles designated and known as gift items; on these said gift items the Lessee covenants and agrees to pay a sum equal to ten percent (10%) of the gross sales; said rental shall be payable monthly and shall be determined by a proper audit of the books and records of the Lessee by auditors of the Lessor, and in making such audits the Lessor

shall have the right to determine the gross sales of all items from the operation of said business by the Lessee.

11. The Lessee agrees to keep and make available and accessible to the auditor of the Lessor, at all times, correct, complete, and adequate records and books of accounts which shall reflect, in detail, the operations of the Lessee's business upon the premises hereinabove demised and from the concessions herein granted, and which said records shall particularly reflect the gross sales of the Lessee on the said premises and from said operations and concessions.

12. It is understood and agreed that the Lessor or its authorized agent shall have access to the premises occupied by Lessee at any and all hours.

13. Lessee agrees that said premises shall be used by the Lessee solely and only for the purpose of conducting the type of business heretofore set out; and that Lessee will not assign, sell, or transfer this lease, nor let nor underlet the whole or any part of the premises herein leased without first obtaining the written consent of the Lessor.

[fol. 13] 14. It is agreed between the parties that, in the event the conduct of any employee shall, in the judgment of Lessor or its authorized agent, be sufficiently reprehensible to justify his discharge, Lessee agrees to discharge said employee upon request of Lessor or its authorized agent. All employees of Lessee shall comply with the health regulations ordained by the City of Memphis or enacted by the State of Tennessee, and shall, upon request of Lessor or its authorized agent, furnish any necessary health certificate, and in all other respects shall comply with applicable laws.

15. The Lessor shall have the right to approve the kind, quality, quantity, and location of any additional equipment placed by the Lessee in said premises, and the Lessor will be given reasonable opportunity to make such inspection; and the Lessee expressly agrees not to install additional equipment that the Lessor does not approve.

16. The locations of the tables, chairs and other equipment used in conducting operations outside of the building, and all vending machines, newsstands, and removable

stands and wagons shall be approved and designated by the Lessor or its duly authorized agent; and said tables, chairs, equipment, vending machines, newsstands, and removable stands and wagons shall be moved and their locations changed from time to time whenever requested by the Lessor or its duly authorized agent to do so; and upon the failure of the Lessee to comply with any such request, the Lessor or its duly authorized agent is hereby authorized at the expense, if any, of the Lessee to make such changes as have been requested.

17. The Lessee agrees that it will paint and decorate the premises demised to it in the present Administration Building, and any premises which it may occupy under the terms hereof in the temporary addition contemplated to be erected to the said Administration Building. Lessee, also, agrees to install light fixtures in all of said premises, and carpeting therefor, together with such tables, fixtures, utensils and other properties required for the operation of an attractive high-class restaurant. The Lessor shall not be [fol. 14] required to make any improvements to any of the premises herein demised during the term of this lease, and the Lessee agrees to make no changes, alterations or additions in the said premises without the written consent of the Lessor, or its duly authorized agent.

18. The Lessee agrees to maintain the premises herein demised in a safe condition, and to hold the Lessor harmless from any and all liability that may grow out of the failure to maintain said premises in a safe condition.

19. All of the said equipment purchased by the Lessee, and subsequently installed by the Lessee, placed in said premises may be removed by the Lessee prior to the termination of this lease, except as hereinafter provided; and at the expiration of this lease, the Lessee agrees to deliver unto the Lessor the possession of the premises herein demised in as good order and condition as at the time of entering upon same under this lease, destruction or damage by fire, storm, or other casualty, and ordinary wear and tear excepted.

20. The premises herein leased shall, during the term of this lease, be used by Lessee only and exclusively for

lawful purposes, and no part of the premises shall be used in any manner whatsoever for any purposes in violation of the laws of the United States, the State of Tennessee, or the ordinances, rules and regulations of the City of Memphis, or ordinances, rules and regulations which the City of Memphis has or may promulgate for the efficient management, control and operation of said Memphis Municipal Airport.

21. Lessee agrees not to commit or permit to be committed any waste whatsoever on said premises and further agrees not to create or allow any nuisance to exist on said premises, and to abate any nuisance that may arise promptly and free of expense to Lessor. Lessee agrees to remove at all times all bottles, waste or litter of any nature appearing upon the premises or grounds caused by said Lessee or its agents or patrons in the operation of said business. Lessee agrees to keep the premises occupied in a [fol. 15] clean and orderly condition and satisfactory at all times to Lessor, and said Lessee shall at all times comply with all Health and Sanitation laws now in force in the City of Memphis and State of Tennessee, and all laws and ordinances to be hereafter enacted.

22. For the purposes of this lease, Lessor has designated the Manager of said Airport as its duly authorized agent, and in his absence, his assistants shall act in his place and stead; but said authorized agent may be changed from time to time by the Lessor, in which event, the Lessee shall be given written notice of such change or changes.

23. The Lessee shall have the privilege of renewing this lease upon the same terms and conditions for a period of three years upon giving written notice of their desire so to renew at least sixty days before the expiration of this lease.

24. Should the building upon the demised premises be totally destroyed by fire or other cause or so damaged that rebuilding or repairs cannot be completed within one hundred and eighty days from the date of the fire or other cause of damage, this lease shall terminate and the Lessee shall be allowed an abatement of rent from the date of

such damage or destruction. However, if the damage is such that rebuilding or repairs can be completed within one hundred and eighty days, the Lessor covenants and agrees to make such repairs with reasonable promptness and dispatch and to allow Lessee an abatement in the rent for such time as the building in untenantable.

25. It is agreed by and between the parties hereto that the Lessor shall have a first lien upon all interests of the Lessee in this leasehold, and upon all merchandise, furniture and fixtures erected, installed or put on said premises during the continuance of this lease, except such articles, food and drinks as are sold in the usual course of retail business, and upon all cooking utensils, cutlery, tableware and other equipment which the Lessee may own and use [fol. 16] in the operation of the business hereinabove described, for the payment of rent, and also for the satisfaction of any cause of action which may accrue to the Lessor by the provisions of this instrument; and in the event the Lessor shall exercise the option granted in Paragraph 26 of this lease to terminate the said lease, (1) the Lessor is authorized to enter upon the premises where the said property may be, and remove and sell the same at public sale by advertising the same for a space of ten days by three or more written or typewritten posters put up in public places in Shelby County, Tennessee, and out of the proceeds of the sale retain the full amount of any indebtedness of the Lessee to the Lessor accruing by virtue of the terms of this lease, together with all damage, costs and expenses occasioned the Lessor by reason of such breach and said sale, the balance, if any, to be paid to the Lessee; or (2) the Lessor shall have the right at its election to take possession of the properties in the continued operation of the business theretofore operated by the Lessee on the premises herein demised, the fair value of such properties to be determined by three disinterested appraisers, one to be appointed by each of the parties hereto and the other to be selected by them, and upon the determination of such fair value, the amount thereof shall be credited upon any indebtedness of the Lessee to the Lessor accruing by virtue of the terms of this lease, and also to the full payment of any damage, costs and expenses occasioned the Lessor by

reason of such breach, and the balance, if any, of such fair value over said indebtedness, damage, expenses, and costs shall be paid by lessor to the lessee.

26. It is a condition hereof and it is hereby agreed that this contract and lease shall at the option of the Lessor, become void and terminate if the Lessee should fail to comply with any conditions or covenants herein stated, or if the Lessee fails to make prompt payment of the monthly rentals as above provided, or if the Lessee fails to keep [fol. 17] accurate, complete and correct books and records reflecting in detail the gross sales from said operations and concessions, as above provided, available to Lessor at all reasonable times, or if the Lessee fails to move or remove the tables, chairs and other equipment used in conducting any open air business which may be permitted, vending machines, newsstands, and removable stands and wagons, or any of them, from time to time whenever requested by the Lessor, or fails to comply with any other request herein authorized of the Lessor or its duly authorized agent, or if the Lessee, their agents, servants, or employees violate or fail to comply with and observe, in every respect, the rules and regulations of the City of Memphis now in force or hereafter adopted, or if the said Lessee should sell, transfer or assign this lease, or let or underlet the premises herein leased, in whole or in part, without the written consent of the Lessor, or should the Lessee file or have filed against it any proceedings in bankruptcy or be adjudicated a bankrupt, or should any attachment or execution or any other legal process be issued or levied upon this lease and contract; and upon the happening of any one or more of the above provided contingencies, this lease and contract shall immediately terminate at the election of the Lessor, and the Lessor may enter and take possession of the so-leased premises and properties and the Lessee agrees to immediately vacate and deliver up the premises, and the remainder of the term of this lease shall be forfeited.

27. The Cafe in the Administration Building at the said Memphis Municipal Airport is hereby designated as the place to which all notices, letters and other communications to the Lessee may be mailed or delivered; and the

delivering at said place, or depositing in any mail box regularly maintained by the post office, of any notice, letters or other communication to the Lessee addressed to them at said place shall be deemed sufficient service thereof [fol. 18] upon the Lessee, and the date of said service shall be the date of such delivery or mailing; but nothing herein contained shall be deemed to preclude or render inoperative the service of any notice, letter or other communication personally upon the authorized agents of Lessee.

IN TESTIMONY WHEREOF, the Lessor and the Lessee have executed two copies of this lease, this the day and year first above written.

CITY OF MEMPHIS, Lessor

By .....
Mayor

By .....
Commissioner

By .....
Commissioner

By .....
Commissioner

By .....
Commissioner

ATTEST:

.....
Comptroller

APPROVED:

.....
Asst. City Atty.

DOBBS HOUSES, INCORPORATED, Lessee

By .....
President

ATTEST:

.....
Asst. Secy.

(All signatures illegible)

[fol. 19] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

ANSWER OF DEFENDANT, W. S. HAVERFIELD
—Filed April 21, 1960

This defendant admits that he was the manager of The Dobbs Houses, Inc. Restaurant located at Memphis Municipal Airport at the time alleged in the complaint. He states that he operated said restaurant facilities in accordance with the policies of his employer and in compliance with the laws of the State of Tennessee.

Defendant, W. S. Haverfield, adopts and relies on the defenses as stated in the answer of Defendant, Dobbs Houses, Inc.

Montedonico, Boone, Gilliland, Heiskell & Loch, Attorneys for Defendant, By: John M. Heiskell.

Certificate of Service (omitted in printing).

[fol. 20] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

ANSWER OF DEFENDANT, DOBBS HOUSES, INC.
—Filed April 21, 1960

First Defense

Plaintiff has failed to state a claim against this defendant upon which relief can be granted.

Second Defense

Defendant, Dobbs Houses, Inc., admits that it is a corporation which operates restaurant facilities at Memphis Municipal Airport in space which it leases from the City of Memphis, and it admits that the lease between Dobbs Houses, Inc. and the City of Memphis contains the provisions which are quoted in paragraph V(b) of the complaint.

It further admits that it maintains separate restaurant facilities for the service of white persons and negroes.

[fol. 21] Defendant, Dobbs Houses, Inc., avers that its restaurant operations at the Memphis Municipal Airport are purely a private enterprise and that the City of Memphis exercises no control or direction over said operations except that this defendant must comply with the terms of its lease, said lease having been filed with this Court as an exhibit to the answer of the City of Memphis.

This defendant avers that it is its right to serve in its restaurant only those persons whom it desires to serve and to serve them in such place and in such manner as it may deem advisable.

As a matter of business practice and in accordance with custom and usage of the area it requires that negro customers be served in an area which is segregated from that in which white customers are served.

Third D

Defendant, Dobbs Houses, Inc., further avers that there is in existence a valid existing and constitutional statute of the State of Tennessee, Section 53-2120, Tennessee Code Annotated, which authorizes the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee, to make the rules and regulations for the operation of restaurants in Tennessee. It further avers that there has been promulgated a valid regulation of said Division and Department designated as Regulation No. R-18(1), which reads as follows:

"Restaurants catering to both white and negro patrons should be arranged so that each race is properly segre-

gated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons [fol. 22] of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises."

Violation of the above quoted regulation is declared to be a misdemeanor punishable by fine by Section 53-2120, Tennessee Code Annotated, which reads as follows:

"Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant who shall fail or refuse to comply with any of the provisions of this Act, or with the rules and regulations promulgated by the Division, shall be deemed guilty of a misdemeanor, and shall be fined not less than ten dollars nor more than one hundred dollars for each offense, and each day after sufficient notice has been given shall constitute a separate offense."

Until and unless the above cited regulation shall have been declared unconstitutional by a court of competent jurisdiction and of final review, defendant, Dobbs Houses, Inc., would be in violation of the laws of the State of Tennessee if it did not provide separate facilities for the service of white and negro citizens and would be subject to forfeiture of its lease with the City of Memphis in that it would be permitting the use of the premises in violation of the laws of the State of Tennessee which in turn would be a violation of that provision of its lease with the City of Memphis which is quoted in paragraph V(b) of the complaint.

Fourth Defense

Defendant, Dobbs Houses, Inc., avers that it operates a restaurant at the Memphis Municipal Airport as a private facility to which the 14th Amendment does not apply, and that it has the legal right to enforce any rules and policies which it deems desirable in regard to the seating of patrons,

including the right to seat and serve patrons in separate [fol. 23] areas because of race or color.

This defendant denies that plaintiff is entitled to any relief against it and avers that the relief prayed cannot in any event be granted unless and until the statute of Tennessee heretofore cited and the regulation of the Department of Conservation promulgated pursuant thereto are declared unconstitutional by a three judge court, after due notice to the Governor and the Attorney General of the State of Tennessee as required by Sections 2281 and 2284, Title 28, United States Code Annotated.

Montedonico, Boone, Gilliland, Heiskell & Loch, Attorneys for Defendant, By John M. Heiskell.

Certificate of Service (omitted in printing).

[fol. 24] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT —Filed May 18, 1960

Comes now the plaintiff, by his undersigned attorneys, and moves this Court for a summary judgment pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure and as grounds therefor shows the following:

1. The plaintiff's affidavit, attached to this Motion for Summary Judgment, shows that there is no genuine issue as to any material fact.

2. The answers filed by all defendants in this case show that there is no genuine issue as to any material fact.

3. The plaintiff is entitled to judgment as a matter of law.

Wherefore, plaintiff prays that this court grant a summary judgment in his favor.

A. W. Willis, Jr., 588 Vance Avenue, Memphis, Tennessee; R. B. Sugarmon, Jr., 588 Vance Avenue, Memphis, Tennessee; H. T. Lockard, 322½ Beale Avenue, Memphis, Tennessee; B. L. Hooks, 588 [fol. 25] Vance Avenue, Memphis, Tenn.; I. N. Murphy, 588 Vance Avenue, Memphis, Tennessee; Constance Baker Motley, Thurgood Marshall, Suite 1790, 10 Columbus Circle, New York 19, New York, Attorneys for Plaintiff.

NOTICE OF MOTION

To:

Frank Gianotti, Esq., Commerce Title Building, Memphis, Tenn.; Albert C. Rickey, Esq., Columbian Mutual Tower, Memphis, Tenn., Attorneys for Defendant, City of Memphis.

Montedonico, Boone, Gilliland, Heiskell & Loch, Attorneys for Defendants W. S. Haverfield and Dobbs Houses, Inc.

Please Take Notice that the undersigned attorneys for the plaintiff will bring on the foregoing Motion for Summary Judgment before the United States District Court, Western District of Tennessee, Western Division, on the 3 day of June, 1960, at 9:30 A.M. or as soon thereafter as counsel can be heard.

A. W. Willis, Jr., 588 Vance Avenue, Memphis, Tennessee; R. B. Sugarmon, Jr., 588 Vance Avenue, Memphis, Tennessee; H. T. Lockard, 322½ Beale Street, Memphis, Tennessee; B. L. Hooks, 588 Vance Avenue, Memphis, Tennessee; B. F. Jones, 211 South Third Street, Memphis, Tennessee; [fol. 26] I. N. Murphy, 588 Vance Avenue, Memphis, Tennessee; Constance Baker Motley, Thurgood Marshall, Suite 1790, 10 Columbus Circle, New York 19, New York, Attorneys for Plaintiff.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 27] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed May 18, 1960

Comes now Jesse Turner, Plaintiff in the above styled cause, being first duly sworn according to law, on oath deposes and says:

That on the 28th day of April, 1959, he and two business associates entered the Dobbs Houses Restaurant in the Memphis Municipal Airport and were refused service in the main part of the Dining room; upon entering the Dobbs Houses Restaurant, affiant and his companions were stopped by a hostess and directed by her to a small room reserved for Negroes adjacent to the main dining room; upon requesting to see the manager, affiant was met by Defendant, W. S. Haverfield, who identified himself as the manager and stated that Negroes were not served in the main dining room but that a smaller area was reserved for service to Negroes; Plaintiff declined the invitation to be served in the small room reserved for Negroes and left;

Further deposing, affiant says that on the 29th day of October, 1959, while returning from Atlanta, Georgia as a passenger of the Eastern Airlines, flight No. 367, he arrived at the Memphis Municipal Airport at approximately 7:45 P. M., and entered the Dobbs Houses Restaurant, he was met by a hostess who informed him that Negroes could not eat in the main dining section and referred him to the Manager, Mr. W. S. Haverfield; the manager was sitting in a small room containing facilities for serving a small number of people, he identified himself as W. S. Haverfield and told Plaintiff that the Restaurant did not serve Negroes in the main dining room but

that he could be served in this smaller room; affiant declined the offer and left.

Further affiant sayeth not:

Jesse Turner

Sworn and subscribed to before me, this 17th day of May, 1960.

Gwendolyn McEver, Notary Public.

My Commission Expires Oct. 2, 1960

(Seal)

[fol. 28] Certificate of Service (omitted in printing).

[fol. 29]

In the District Court of the United States

For the Western District of Tennessee

Western Division

Civil Action No. 3934

Jesse Turner, Plaintiff,

vs.

City of Memphis, a Municipal Corporation Chartered Under the Laws of the State of Tennessee, and Dobbs Houses, Inc., a Corporation Formed and Existing Under the Laws of the State of Tennessee, and W. S. Haverfield, Manager of The Dobbs Houses, Inc. Restaurant in the Memphis Municipal Airport, Defendants.

Transcript of Proceedings—June 3, 1960

[fol. 30] Be It Remembered That the above styled cause came on to be heard on this the 3rd day of June, 1960, at nine-thirty o'clock A. M., on motion of the plaintiff for summary judgment, in the United States District Court for the Western District of Tennessee, Western Division, at Memphis, before the Honorable Marion S. Boyd, Judge,

presiding, when and where proceedings were had, as follows:

APPEARANCES:

For the Plaintiff: Constance Baker Motley, Suite 1790, 10 Columbus Circle, New York 19, New York; R. B. Sugarmon, Jr., 588 Vance Avenue, Memphis, Tennessee; A. W. Willis, Jr., 588 Vance Avenue, Memphis, Tennessee; H. T. Lockard, 322½ Beale Avenue, Memphis, Tennessee; B. L. Hooks, 588 Vance Avenue, Memphis, Tennessee.

[fol. 31] For the Defendants: Mr. Frank B. Gianotti, Commerce Title Building, Memphis, Tennessee; Mr. Albert Rickey, Columbian Mutual Tower, Memphis, Tennessee; Mr. John Heiskell, Commerce Title Building, Memphis, Tennessee; Mr. Jack Petree, Commerce Title Building, Memphis, Tennessee; Mr. Larry Creson, Exchange Building, Memphis, Tennessee.

The Court: 3934, Turner against Dobbs House and City of Memphis. Motion for summary judgment.

Attorney Willis: Ready for the plaintiff.

Mr. Petree: Ready for the defendant.

(Proceedings re other matters.)

[fol. 32] The Court: All right, that leaves us with the case of Turner against City of Memphis, Dobbs House.

Is Dobbs House represented here?

Mr. Heiskell: Yes, sir.

The Court: Mr. John Heiskell, you represent them.

And Mr. Petree and Mr. Creson represent the City?

Mr. Petree: Your Honor, Mr. Gianotti represents the City.

The Court: Mr. Gianotti represents the City. You are in the case?

Mr. Petree: We are at the last minute, Your Honor, with a motion to consolidate all parties.

The Court: Well, this is a motion for summary judgment by the plaintiff Turner. And it appears here the defendants are urging in their answers that a three-judge court be appointed.

Am I correct about that?

Mr. Gianotti: That is correct.

Attorney Sugarmon: That is not one of the—

The Court: (Continuing) —Be convened in this case. [fol. 33] And I am just wondering, thinking about orderly procedure, if that is a question we should discuss first.

The Court has in mind that if it is a case for a three-judge court, the three-judge court probably should hear this motion.

Attorney Sugarmon: If the Court please, I would like first to move the admission of Mrs. Constance Baker Motley, a member of the Supreme Court and Sixth Circuit bars, to this Court. And she will present argument to the Court on this.

The Court: All right. I believe she has been with us.

Mr. Gianotti: Yes, sir.

The Court: And we are glad to have her.

Does that sound correct?

Mr. Gianotti: Yes, Your Honor. We have had a discussion of the matter. First, we think this is a matter for a three-judge court. And we are prepared to proceed with that.

The Court: All right. Suppose you give us your views about this, then, at this time.

[fol. 34]

ARGUMENT OF MRS. MOTLEY

Mrs. Motley: Well, may it please the Court, this case involves racial segregation at the Memphis Municipal Airport, and what we are concerned with here is whether the lessee of publicly owned property is subject to the restrictions of the Fourteenth Amendment.

Now, it is our contention that the Supreme Court has already ruled on that question as to whether the lessee of a municipally owned facility is subject to the Fourteenth Amendment, and we contend the Supreme Court has ruled on that question in a case which arises in this Circuit, the

case of Muir against the City of Louisville, Kentucky. In that case, the City had leased to a private operator an outdoor theater. The private operator refused to admit negroes to the theater. A negro plaintiff brought suit against the City and the owner and lessee of the theater, alleging violation of the Fourteenth Amendment. Now, the Sixth Circuit ruled that the lessee in that case was not subject to the Fourteenth Amendment. The case went to the United States Supreme Court, and the Supreme Court vacated the judgment of the Sixth Circuit, in light of its decision in the case of Brown against the Board of [fol. 35] Education at Topeka, a school segregation case. The case was returned to the Sixth Circuit for consideration in the light of that decision and for consideration of the conditions which prevailed at that time.

So the question presented in this case is identical with the question presented in the Muir case. And that is whether the lessee of a publicly owned facility is subject to the Fourteenth Amendment. So that we have before the Court a case upon which the Supreme Court has already ruled.

Now, in addition, the United States Supreme Court in the case of Cooper against Aaron referred to similar cases in which Federal Courts of Appeal had held lessees of municipally owned property subject to the Fourteenth Amendment.

In the case of Cooper against Aaron, which we cite in our memorandum brief, the Supreme Court specifically refers to the case of Derrington against Plummer, a case which arose in the Fifth Circuit involving leasing a cafeteria operation at a court house in the State of Texas. In [fol. 36] that case the Fifth Circuit held that lessee of public property was subject to the restrictions of the Fourteenth Amendment.

The Supreme Court in that case cited that case and other cases of similar nature for the proposition that wherever a state is involved through any arrangement, management, or participation by way of funds, the Fourteenth Amendment restrictions apply.

The Eighth Circuit has also held in the Little Rock case, in Cooper against Aaron, that—

The Court: Are you addressing yourself to the question of whether or not this is a three-judge case?

Mrs. Motley: Yes, what I am trying to establish is the law is so well settled that there is no merit—there is no merit at all to the constitutional contention, if any, of the plaintiffs. It has been settled by the United States Supreme Court. And it has been settled by several Federal Courts of Appeal. So that if the defendants were to contend a state regulation requiring segregation here is constitutional, I am saying that that contention has no merit because the law is well settled that the lessee of public property cannot discriminate against members of the [fol. 37] public.

The Court: In the Muir case, did they strike down state statutes in that case?

Mrs. Motley: No, I don't believe there is a state statute involved in that case. I believe that is a case involving simply a lease of public property and that there was not a state statute involved.

The Court: We have state statutes and regulations, I believe they refer to them.

Are any of these cases you cite there—do they involve state statutes or city ordinances?

Mrs. Motley: Well, some of them I think involve city ordinances. For example, the Coke case in Atlanta, and I think that is about the only one that involved a city ordinance, as I recall.

The Court: Which one is that?

Mrs. Motley: It is the case of Coke against City of Atlanta.

The Court: Is that cited in your memorandum?

Mrs. Motley: But the other cases, the Muir case, the Tate case—

The Court: Let me get these. Well, what do you mean, [fol. 38] Cope?

Mrs. Motley: Yes, sir.

The Court: C-o-p-e?

Mrs. Motley: That is right, C-o-k-e.

The Court: C-o-k-e?

Mrs. Motley: Yes. I will look at that, Your Honor, and see whether or not that involved—, I think there was a city

ordinance involved in that case. No, I don't see that specifically mentioned. I have a photostatic copy of the opinion. It is not reported, Your Honor. But I don't see that specifically referred to here. So I would say from this decision that it does not appear that that did involve a city ordinance. I was thinking there was a city ordinance involved in that case. But the situation there was identical to the situation in this particular case in that it involved segregation in a restaurant in an airport in the City of Atlanta. And it seems to me—my recollection is that in the record somewhere there did appear to be a city ordinance of Atlanta requiring such segregation, as I recall it, but just looking at the opinion there I don't believe the ordinance is referred to here.

[fol. 39] The Court held that the lessee in that case was subject to the Fourteenth Amendment because the lessee had leased publicly owned property. But I do think that somewhere in the record of that case there was brought out a city ordinance. I am just not certain, of course, but that is my impression that that was involved in that case.

But these other cases, as far as I recall, there was no specific—(counsel confer.)

Well, the cases which we have cited, as I say, I don't know a city ordinance involved in any of these leased cases. But, as I say, I know the Coke case did involve a city ordinance.

But the point is, Your Honor, that a three-judge court can only be convened where there is a serious question as to the constitutionality of a state statute. And the fact that there is a state statute involved does not mean that a three-judge court must be convened. It must be shown that there is some merit, first of all, to the contention that the state statute is constitutional. If there is no merit to that contention, then a three-judge court cannot be convened. And that [fol. 40] the Ex Parte Poresky, which we have cited in our memorandum, which is the leading decision, I think, and that is the United States Supreme Court.

Then the second point is the one I made previously, and that is that this question has already been decided by the United States Supreme Court. And certainly a three-judge court could not be convened where the constitutionality of the statute involved is precluded or it has been decided by

prior decisions of the United States Supreme Court. And I think that is certainly the situation here.

So I don't think this is a case calling for a three-judge court.

ARGUMENT OF MR. GIANOTTI

Mr. Gianotti: If Your Honor please, I wish to state before the Court we have set up in our answer, both Mr. Heiskell's answer representing Dobbs Houses, and the City of Memphis—Mr. Rickey and I as City attorneys, that this is a case requiring a three-judge court.

Your Honor will no doubt well remember, as will counsel, in the street car case we went into these matters I think rather thoroughly on a splendid proposition on that.

[fol. 41] In that case the Attorney General or Governor had not been notified as required by the law. And many cases reviewed—briefed and reviewed. And the Court later—two or three weeks, I think we were before Your Honor and Judge Martin, and Judge Martin spoke for Your Honor, indicated that you all in the street car case thought there was considerable merit—the fact that the statute had not strictly been complied with. Evidently the Court's remarks were based on numerous decisions that were presented to the Court. And they are strictly, as I understand it, strictly construed.

Now, as counsel has indicated, she evidently has no authority in point. Frankly, we have searched—Mr. Rickey and I; we have been unable to find these cases that have been cited there in point on this particular case, for the reason that there is a statute—a state statute which has been pled here, and reading that statute and reading the Federal statute requiring the notice to the Attorney General and to the Governor—, I understand the record in this case indicated for some reason,—why we don't know,—that notice was given the Attorney General, but no notice, as I under-

[fol. 42] stand, has been given the Governor.

There is a further possibility which counsel have discussed involving another statute of the State of Tennessee, which no doubt will be brought into this case at the proper time.

I mention it at this time in an attempt to throw light on the proposition that this matter is not well settled as counsel—in our opinion as counsel has indicated. The statute to which I refer has not been previously used in cases pending before this Court or a three-judge court. The statute is namely—

Mr. Rickey: 62-710.

Mr. Gianotti: 62-710. It was a statute passed in 1875 to 1877, and will no doubt be impleaded in the Auditorium case, which was just—just recently filed and in which the answer hasn't been yet filed. This is statute of the State of Tennessee generally giving to folks such as Dobbs House and perhaps—and many others in the City of Memphis the right to serve whomsoever they may choose. [fol. 43] Now, there are many cases,—New York, Chicago, Philadelphia, New Jersey, and other places, which have been decided by the state courts where those statutes are non-discriminatory in substance, and The Supreme Courts of certain of those states have held that they could not be discriminatory. There are other cases, on the other hand, where the statute gives the person the traditional—the right to serve whom they may choose,—then the state has the same right to pass on that statute.

It could very well be, Your Honor, that this matter could go forward to another phase or stage of Federal abstention in the absence of a fairly recent Supreme Court decision on either one of the statutes to which we are now referring, namely, the right to choose statute, as we will call it, and that is a specific regulation of the State of Tennessee saying that the very thing that counsel is asking be done at the airport cannot legally be done by Dobbs Houses. They are subject to arrest and fine if they do the very thing that counsel is asking in this petition be done. [fol. 44] So certainly, first, we are entitled to a three-judge court in the absence of any Supreme Court decision we know anything about involving the interpretation of the state statute. Second, the right to choose statute with—with the right to serve statute I think to implement, and of course the fact that we say that we certainly should have a three-judge court under the law, under the express wording of the Act itself.

Anything you want to add?

Mr. Heiskell: I would just like to say at this time I would like permission in behalf of defendant, Dobbs Houses, to amend the answer to specifically plead 62-710 of Tennessee Code Annotated and have it before the Court.

The Court: You are asking that that be done at this time?

Mr. Heiskell: That we be permitted to file an amendment to the answer of Dobbs Houses to specifically plead it.

The Court: Is there objection to that?

Mrs. Motley: No, sir, Your Honor, we don't have any [fol. 45] objection. But if the statute there is—what is it?

Mr. Gianotti: Right there, check it.

Mrs. Motley: It generally permits private owners to select their clientele. We say that this is not involved. The question is whether or not the lessee of public property may discriminate against members of the public. We do not contend a private restaurant owner doesn't have the right to select his clientele. That is not involved in the case.

Mr. Gianotti: Referring to the section there, the definite lease between the City of Memphis and Dobbs Houses—, nothing in the lease as such of a discriminatory nature. It has the usual covenants in it about following the law, and things you find in most every lease.

So Dobbs House—I am not attempting to speak for them—but they are very patently placed in the position if they do what counsel have requested be done under the interpretation as asked this Court place on it, we think, as defendants in court, without the three-judge court as required by statute,—that I am afraid the Dobbs House [fol. 46] is running afoul of the state law.

As expressed, and as I understand, counsel is not suggesting to the Court that there is any case, then, in the memorandum which they have filed, that has a state statute such as we have in Tennessee.

Mr. Heiskell: On behalf of Dobbs House, may I say, if Your Honor please, tha' one of the covenants in the lease requires it be used in conformity with the laws of the

State of Tennessee and the Federal Government, and so on. And we do have a state statute on the book, and we have many decisions in Tennessee that hold that as long—as long as a statute is in—not declared void—in the Tennessee Code, it is the law of the State of Tennessee until declared unconstitutional by the court.

So we, if we comply with the demands that have been made, are not only subject to arrest and prosecution under the state statute, but we are subject to forfeiture of the lease for permitting it to be used in violation of the state law.

So we not only have the personal right to personally control the restaurant, subject to arrest, but the whole [fol. 47] property right of the lease itself in jeopardy. And we certainly contend that until that statute is acted on by a three-judge court that we are in dire jeopardy. And we most respectfully submit to the Court—

The Court: Do you want to be heard further?

Mrs. Motley: Yes, Your Honor.

The Court: All right.

Mrs. Motley: I would like to call Your Honor's attention to the Booker case cited by us in the memorandum, which was a case before this Court.

The Court: The Court well remembers that. That has been four or five years ago.

Mrs. Motley: Yes.

The Court: Or after the Supreme Court's opinion in the Brown case—.

Mrs. Motley: That is right.

The Court: The school case.

Mrs. Motley: That was the school case, Your Honor. And it involved a state statute. And Your Honor held that a three-judge court was not required on the constitutionality of that statute, the unconstitutionality of that statute was clear. And that was upheld by the Sixth Circuit, [fol. 48] So that the determinative thing is not whether there is a state statute; the determinative thing is whether there is a state statute the constitutionality of which is seriously contested.

The Court: The Supreme Court in effect in that case ruled out all state laws and said so in effect, didn't they?

But go ahead. I didn't mean to interrupt.

Mrs. Motley: Well, as I understand, Your Honor, the Supreme Court in the Brown case knocked out all state statutes on schools. And right after that there were many cases involving other areas, recreational facilities, which the Supreme Court held immediately after the Brown case, —a case involving recreation in Atlanta, the Holmes case, where it reversed the Circuit Court ruling, recreation permitted in Atlanta. And the Muir case after—immediately after Holmes, involving leasing of public property.

So I think it clear from the decisions decided there right there after Brown that wherever the state is involved there cannot be racial discrimination. And the Supreme Court [fol. 49] specifically cited Cooper against Aaron,—citing these leasing cases.

Now, as far as statute or regulation is concerned here, it is my understanding that this regulation is not enforced, that negroes can eat in the restaurant in Nashville and Knoxville. And I understand that since the settlement was made in Nashville involving the restaurant, the Attorney General has made some statement to the effect that he does not believe that this state regulation is constitutional.

So that I think these defendants fear that they would be prosecuted for violation of that regulation is not well founded, because I think that it is clear that the regulation is not being enforced in view of the situation which has recently developed in Nashville where there was an agreement to serve negroes in restaurants.

So that I don't think we have a case where there is a serious question of enjoining the enforcement of a state statute. And the complaint does not ask this Court to enjoin the enforcement of any state statute.

Moreover, the defendants themselves claim that they have a right because they are private to discriminate. [fol. 50] Our contention is they are public.

And so that their contention is two things. One, they are following the statute, and two, that they have a right in their own capacity to discriminate.

We say as to the second they don't, because they are subject to the Fourteenth Amendment, having leased public property.

Now, there is another aspect of this case. That is the city ordinance requiring segregation of rest room facilities. Certainly I don't think anyone is contending that a three-judge court is necessary for the determination of the constitutionality of a city ordinance as to this. So at least as to that phase of the case there seems to me there is no question but that no three-judge court is involved there.

Oral Ruling Convening a Three-Judge Court

The Court: Here are the Court's views about it. The defendants take the positions in their respective answers that a three-judge court under the Federal Constitution to hear this attack on the state statutes and regulations is required. The defendants have requested that such three-judge court be convened to hear this case. And the Court [fol. 51] is inclined to agree with the defendants on this. The Court, in other words, thinks that it is necessary that a three-judge court be convened. And the Court will take the necessary steps to have this done. The Court had not realized until recently this question was involved in this litigation or it would have, I think, taken steps to act before now.

Well, it is not necessary to say anything more. This will be a three-judge hearing. And that means the motion for summary judgment is not acted on, of course, at this time, but will be a matter for the three-judge court, the first order of business with the three-judge court, I should think.

All right.

Mrs. Motley: Do we understand Your Honor is going to take steps to convene a three-judge Court?

The Court: Yes.

[fol. 52] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 53] [File endorsement omitted]

IN THE UNITED STATES THREE JUDGE COURT

CONVENING IN THE

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—Filed June 6, 1960

Comes now the plaintiff, by his undersigned attorneys, and moves this court for a summary judgment pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure and as grounds therefor shows the following:

1. The plaintiff's affidavit, attached to this motion for summary judgment, shows that there is no genuine issue as to any material facts.

2. The answers filed by all defendants in this case show that there is no genuine issue as to any material fact.

3. The plaintiff is entitled to judgment as a matter of law.

Wherefore, plaintiff prays that this court grant a summary judgment in his favor.

A. W. Willis, Jr., 588 Vance Avenue, Memphis, Tennessee; R. B. Sugarmon, Jr., 588 Vance Avenue, Memphis, Tennessee; H. T. Lockard, 322½ Beale Avenue, Memphis, Tennessee; B. L. Hooks, 588 Vance Avenue, Memphis, Tennessee; L. H. Murphy, 588 Vance Avenue, Memphis, Tennessee; Constance Baker Motley, Thurgood Marshall, Suite 1790, New York 19, New York, Attorneys for Plaintiff.

[fol. 54] Notice of Motion

To: Hon. Buford Ellington, Governor of Tennessee, Hon. George F. McCanless, Attorney General of Tennessee,

Frank Gianotti, Esq., Commerce Title Building, Memphis, Tennessee, Albert C. Rickey, Esq., Columbian Mutual Tower, Memphis, Tennessee, Attorneys for defendant, City of Memphis.

Montedonico, Boone, Gilliland, Heiskell & Loch, Attorneys for defendants, W. S. Haverfield and Dobbs Houses, Inc.

Please Take Notice that the undersigned attorneys for the plaintiff will bring on the foregoing Motion for Summary Judgment before a three-judge court, Western District of Tennessee, Western Division, on the 27th day of June, 1960, at 9:30 A. M., or as soon thereafter as counsel can be heard.

A. W. Willis, Jr., 588 Vance Avenue, Memphis, Tennessee; R. B. Sugarmon, Jr., 588 Vance Avenue, Memphis, Tennessee; H. T. Lockard, 322½ Beale Avenue, Memphis, Tennessee; B. F. Jones, 211 South Third Street, Memphis, Tennessee; I. H. Murphy, 588 Vance Avenue, Memphis, Tennessee; Constance Baker Motley, Thurgood Marshall, Suite 1790, 10 Columbus Circle, New York 19, New York, Attorneys for Plaintiff.

Certificate of Service

This is to certify that on the 4th day of June, 1960, I served a copy of the foregoing Notice and Motion for Summary Judgment upon Hon. Buford Ellington, Governor of Tennessee, Hon. George F. McCanless, Attorney General of Tennessee, Frank Gianotti, Esq., Commerce Title Building, Memphis, Tennessee, Albert C. Rickey, Esq., Columbian Mutual Tower, Memphis, Tennessee, and Montedonico, Boone, Gilliland, Heiskell & Loch, Attorneys for Defendants, in the above entitled case, by mailing a true copy of same to each of them at the addresses given herein.

A. W. Willis, Jr., Attorney for Plaintiff.

[fol. 56] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

ORDER ALLOWING DOBBS HOUSES, INC. TO AMEND ANSWER —Filed June 10, 1960

Upon motion of the defendant, Dobbs Houses, Inc., heretofore made in open Court,

It is Ordered that said defendant be, and hereby is, allowed to amend its answer by adding thereto a "Fifth Defense" in words and figures as follows:

Fifth Defense

Defendant, Dobbs Houses, Inc., as a defense, relies on Section 62-710 Tennessee Code Annotated, a valid, existing statute of the State of Tennessee which reads as follows:

"62-710. *Right of owners to exclude persons from places of public accommodation.*—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amuse-
[fol. 57] ment; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of

passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family."

Enter this 10th day of June, 1960.

Marion S. Boyd, Judge.

John M. Heiskell, Atty. for Dobbs Houses, Inc.

[fol. 58]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

Civil Action

No. 3934

JESSE TURNER, Plaintiff,

vs.

CITY OF MEMPHIS, A MUNICIPAL CORPORATION CHARTERED UNDER THE LAWS OF THE STATE OF TENNESSEE, AND DOBBS HOUSES, INC., A CORPORATION FORMED AND EXISTING UNDER THE LAWS OF THE STATE OF TENNESSEE, AND W. S. HAVERFIELD, MANAGER OF THE DOBBS HOUSES, INC., RESTAURANT IN THE MEMPHIS MUNICIPAL AIRPORT, Defendants.

Transcript of Proceedings—June 27, 1960

[fol. 59] Be It Remembered That in the above styled cause, on June 27, 1960, at Memphis, Tennessee, before a three-judge court composed of the Honorable John D. Mar-

tin, Judge of the Sixth Circuit Court of Appeals, Honorable William E. Miller, Judge of the United States District Court for the Middle District of Tennessee, and Honorable Marion S. Boyd, Judge of the United States District Court for the Western District of Tennessee, said three-judge court having been convened to hear the case of O. Z. Evers vs. City of Memphis, et al., Civil Action Number 2903, proceedings were had following the hearing of said cause number 2903, as follows:

APPEARANCES:

For the Plaintiff: Constance Baker Motley, Suite 1790, 10 Columbus Circle, New York 19, New York; R. B. Sugarmon, Jr., 588 Vance Avenue, Memphis, Tennessee; H. T. Lockard, 322½ Beale Avenue, Memphis, Tennessee; A. W. Willis, Jr., [fol. 60] 588 Vance Avenue, Memphis, Tennessee; B. F. Jones, 211 South Third Street, Memphis, Tennessee.

For the Defendants: Mr. Frank B. Gianotti, Commerce Title Building, Memphis, Tennessee; Mr. Albert Rickey, Columbian Mutual Tower, Memphis, Tennessee; Mr. Edward P. Russell, Union Planters Bank Building, Memphis, Tennessee.

[fol. 61] COLLOQUY BETWEEN COURT AND COUNSEL

Mrs. Motley: Before this Court adjourns, we would like the record to show that in the case of Jesse Turner against the City of Memphis, Civil Action Number 3934, the attorneys for the plaintiff served upon the attorney for the defendants in this case a notice and/or motion for summary judgment notifying the defendants that the plaintiffs would move for a summary judgment before a three-judge court on the 27th day of June, 1960.

On June 6, 1960, the plaintiff's counsel sent a copy of that notice and motion to the Governor of the State of Tennessee. And I would like to submit copy of letter which

plaintiff's counsel sent to the Governor, advising the Governor of hearing before a three-judge court in this case. And letter also sent on June 6, 1960, to the Attorney General of the State of Tennessee advising him that the plaintiffs would bring on motion for summary judgment on this date in this case.

Now, the notice of motion contains a certificate of service signed by one of the attorneys for the plaintiffs, indicating that true copy of motion and notice was served on all the [fol. 62] attorneys for the defendants in this case on June 4, 1960.

Now, on June 4, 1960, the plaintiff's counsel also wrote a letter to the Chief Judge of the Sixth Circuit. And we would like the record to contain a copy of that letter.

Mr. Russell: Will you state, please, the substance of that letter? I am not familiar with it.

Mrs. Motley: In that letter we advised the Sixth Circuit Court of the ruling of Judge Boyd on our motion for summary judgment on June 3, to the effect that the issue raised in this case must be disposed of by a District Court of three judges, and asking the Sixth Circuit Chief Judge to arrange to have the case heard before this three-judge court which was going to be sitting here at this time.

(Letters passed in to the Court.)

Now, on the same date of June 4, 1960, the plaintiff's counsel also wrote a letter to Judge Boyd, pointing out that we understood a three-judge court would be sitting on the 27th day of June with of course the case that has just been heard before it, and respectfully requested Judge Boyd to take steps to have our case heard on this same date. [fol. 63] And I would like the record to contain a copy of that letter.

Now, the plaintiffs are here with their counsel. And we are prepared to proceed before this court with a hearing of our motion for summary judgment in this case of Turner against the City of Memphis and Dobbs House Company.

Judge Martin: Now, if I may inquire, you say you want it made part of the record. The matter you are introducing relates to the case about the library, doesn't it?

Mrs. Motley: No, sir. It relates to the case involving the Dobbs House and the restaurant at the airport.

Judge Martin: Well, I said library. I meant Dobbs House. It does not relate to this matter?

Mrs. Motley: Not the bus case, Your Honor.

Judge Martin: Well, we don't make it part of the record in the bus case.

Mrs. Motley: Well, don't intend to make it part of the record in the bus case.

Judge Martin: Let's be clear, let the court reporter be clear on that, that these communications have nothing to do with the instant case?

[fol. 64] Mrs. Motley: Yes.

Judge Martin: They deal with the other case?

Mrs. Motley: I thought I made it clear for the reporter by reading the name and to whom it was, now. But I want to enter this—.

Judge Martin: Oh, you mean this in connection with the hearing of this case, or it refers to another—?

Mrs. Motley: No, I meant it—

Judge Martin: We understand each other now. You are making these record statements here in connection with another case.

Mrs. Motley: Yes, sir, it is another case.

Judge Martin: And so the court reporter will know, for the record, and the papers be duly filed in that case, but we are not taking jurisdiction of that case at this time.

(The Court confers.)

Judge Martin: In view of these statements made in connection with the case of Turner against the City of Memphis, Civil Action 3934, which has been referred to as the Dobbs House case, what matter of record does the attorney for defendant desire to put on record now relating to the [fol. 65] time of service, and so on?

It seems there was no record made, the reporter was not here, when comments were made earlier on this, so you had better get the record clear on that.

Mr. Gianotti: Very well, Your Honor.

Judge Martin: You request the Court not to hear that matter now because you are not ready?

Mr. Gianotti: That is correct.

Judge Martin: And you said you found that you had not been duly notified. So you should put in the record whatever you want to put in it.

Mr. Gianotti: Yes, sir. I think we could make this statement, if it please Your Honors.

It is true we did receive the notice referred to, but in view of the fact that the record will show that we appeared in His Honor Judge Boyd's court in answer to the motion for summary judgment, but referred to the Court the fact that we had raised in our answer the question that this particular case involved state statutes and that in our opinion we thought a three-judge court was necessary. Until this morning—the Court agreed with this proposition and stated [fol. 66] he would order a three-judge court. Until this morning we had no intimation whatever and did not come here prepared fully to argue that question, but were taking our principal time in preparation of the Evers case which was heard this day in this court. We were not prepared this morning, and ask the Court to consider our position in light of the statement we have just made.

This is generally repetition of the statement that was made earlier when counsel approached—both counsel—counsel both approached the bench.

Judge Martin: Do we understand the time you refer to as having been received was before even the three-judge court had been constituted by Judge McAllister of the Sixth Circuit?

Mr. Gianotti: That is my information.

Judge Martin: Well, the case certainly hasn't been set for hearing by this three-judge court, or by Judge Boyd in behalf of it, so actually is not set for hearing today.

Judge Boyd: You represent the City of Memphis?

Mr. Gianotti: City of Memphis. Mr. Heiskell—the record should show further Mr. Heiskell, the attorney for Dobbs House, was present in court when counsel ap- [fol. 67] proached the bench at my request. Certainly he would state—he is not here at this time—, if he were here

he could further my brief conversation with him that he would join in this request.

Judge Martin: Yes, sir.

Judge Boyd: He did state earlier today—

Mr. Gianotti: He did state earlier today that he was not expecting to—

Judge Boyd: He did say that on this matter of the Dobbs House that he was not prepared—.

Mr. Gianotti: That is right.

Judge Boyd: That he did not understand it was to be heard today.

Mr. Gianotti: That is correct, Your Honor.

Judge Boyd: And the Court did in passing on the matter state that it would indulge you—give it a setting for hearing.

Is that your understanding?

Mr. Gianotti: That is correct. And I think I might state further, Your Honor, since this statement has been made by counsel, I think the record will show, with one exception that came about by rather unusual circumstances, we haven't asked for any additional time, and under the circumstances [fol. 68] always sought to be ready without requiring any time. But the record might show I think we did ask additional time in filing reply in the Auditorium case from July 1st to July 9th.

Judge Boyd: This notice counsel makes reference to and made part of the record here was given before the three-judge court was appointed?

Mr. Gianotti: Before the need for a three-judge court was suggested to Your Honor. We suggested it in our answer. But when we came in for hearing before you, Judge Boyd, Your Honor Judge Boyd decided for one—to have a three-judge court appointed.

Judge Boyd: Well, Judge McAllister's appointment of a three-judge court came down about two weeks ago, if the Court recalls correctly, and it was promptly filed with the Clerk, and there has been nothing since that time in the way of a notice of any kind.

Mr. Gianotti: We did not know—

Judge Boyd: (Continuing) At least, none has come to my attention.

Mr. Gianotti: Mr. Heiskell and I did not know the matter of a three-judge court had been appointed until this morning. That may be the fault of myself maybe I should have [fol. 69] checked the docket, but I just didn't know—.

Judge Boyd: In the circumstances the Court feels it would not be fair to defendants to put defendants to trial under these conditions when they are protesting they are not ready.

Is that your view?

Judge Martin: Yes.

Judge Miller: Yes.

Mrs. Motley: Excuse me, Your Honors. There is just one mis-statement of fact I would like to correct for the record. The notice which we gave as part of our motion for summary judgment on this date was not filed prior to your suggestion that a three-judge court was necessary. It was filed on June 6, after Judge Boyd ruled that a three-judge court was required.

Now, the reason I want the record to show was that the reason the plaintiff's counsel filed their notice as early as they did after Judge Boyd's ruling was to avoid any suggestion on the part of the defendants that they did not have sufficient notice, and that was our only purpose for doing so.

[fol. 70] Mr. Gianotti: The Court, as counsel knows, appointed a three-judge court, as counsel knows, and we didn't. I know plaintiff—

Judge Boyd: And the record shows when it was. All right.

Mrs. Motley: The record shows June 9th.

Judge Boyd: Well, about two weeks ago, I believe. That is the Court's recollection.

Attorney Lockard: If the Court please, one thing further. In connection with 2903—.

Judge Martin: What, 2903?

Attorney Lockard: That is right. We drew—we have a suggested order we would like to submit.

Mr. Russell: Do you have a copy for opposing counsel.

Judge Martin: Well, will you get the Marshal to bring in this, pass it to the Court.

The Clerk: Notice was filed June 20 of a three-judge court.

Judge Martin: The Clerk brings in to the Court the record on this Turner action against the City of Memphis, Civil Action Number 3934, from which it appears that the order of Chief Judge McAllister of the Sixth Circuit was [fol. 71] filed with the Clerk of the Court on June 20, 1960. June 20th—.

Mrs. Motley: Your Honor,—

Judge Martin: (Continuing) The order was signed on on the first—the 9th of June, 1960, by Judge Thomas F. McAllister.

Judge Boyd: This judge has no recollection as to when—this judge has no recollection, if it is important in this matter one way or another, as to when that was received, but it was filed promptly with the Clerk upon being received by this judge.

Take these, Mr. Clerk.

All right, anything further?

Judge Martin: Now, the Evers case, which is the case on trial, are you through, both sides, or is there any further matter you desire to present?

(Further proceedings in re case of Evers vs. City of Memphis, et al.)

[fol. 72] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 73]

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
WESTERN DISTRICT OF TENNESSEE
MEMPHIS 3

NOTICE OF TRIAL DATE—July 18, 1960

A. W. Willis, Jr., Atty.
588 Vance Ave.
Memphis, Tenn.

R. B. Sugarmon, Jr., Atty.
588 Vance Ave.
Memphis, Tenn.

H. T. Lockard, Atty.
322½ Beale St.
Memphis, Tenn.

Frank Gianotti, Atty.
Commerce Title Bldg.
Memphis, Tenn.

Albert C. Rickey, Atty.
Columbian Mutual Tower
Memphis, Tenn.

Montedonico, Boone, Gilliland, Heiskell & Loch, Attys.
Commerce Title Bldg.
Memphis, Tenn.

Hon. Buford Ellington
(Reg. Mail)
Governor of Tennessee
Nashville, Tenn.

Hon. George F. McCanless
(Reg. Mail)
Attorney General
State of Tennessee
Nashville, Tenn.

In re: No. 3934-Civil-Jesse Turney vs. City of Memphis, Dobbs Houses, Inc. and W. S. Haverfield.

Gentlemen:

The above styled case has been set for trial before a three judge court November 9, 1960.

Please file points and authorities on which you intend to rely, not less than ten days before the date of trial. If there should be a settlement of this cause prior to the date of trial, please notify this office immediately.

Sincerely yours,

W. Lloyd Johnson, Clerk.

WLJ:PGM
cc: Judge Boyd, Judge Miller and Judge Martin

[fol. 74] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

MOTION TO AMEND ANSWER OF DOBBS HOUSES, INC. AND RULE ON MOTION IN CHAMBERS—Filed November 2, 1960

Now comes the defendant and moves to amend its answer heretofore filed by adding thereto the following:

Sixth Defense

The defendant, for its sixth defense, avers that this Court should not take jurisdiction of this action in the light of the principle of abstention and recognizing the principle of equity and comity, or should stay the proceedings and require the complainant to take appropriate action in State Courts of competent jurisdiction to declare their rights under the statutes and regulations in question. The defendant avers that the Courts of the State of Tennessee are open to complainant or representatives of their cause.

Defendant avers that the statutes and regulations are open to interpretation and that the State Courts should be allowed to pass on said enactment in view of the further-[fol. 75] ance of Federal-State relations and because of the position taken by the defendant herein.

Defendant requests said Motion be granted for the following reasons:

(a) That justice recognize that the defendants be allowed to amend their answer;

(b) That the amendment is necessary to clarify the issue and expedite the discharge of the litigation;

(c) That the complainant has moved for summary judgment necessitating the amendment;

(d) That the amendment is to plead as a defense an applicable rule of law.

Defendant further moves that the Three-Judge Court accept and rule on said Motion to Amend the Answer in Chambers pursuant to Rule 77 of the Federal Rules of Civil Procedure, and that said amendment be allowed before the date set for the convening of said Three-Judges for the setting of this case on November 9, 1960.

Montedonico, Boone, Gilliland, Heiskell & Loch, Attorneys for Defendant, Bobbs Houses, Inc., By John M. Heiskell.

Certificate of Service (omitted in printing).

[fol. 76] [File endorsement omitted]

In the United States District Court

Western District of Tennessee

Western Division

[Title omitted]

Notice of Motion—Filed November 2, 1960

Please take notice that the undersigned attorneys for the Defendant, City of Memphis, in the above styled cause have filed the attached Motion to Amend and Rule on Motion in Chambers with the Clerk of the District Court of the Western District of Tennessee, and will present the Motion to the designated Three-Judge Court in Chambers by delivering a copy of Amendment to the District Court Clerk at the Federal Building at Memphis, Tennessee, on the 2nd day of November, 1960, at Federal Bldg., and further by mailing copies thereof to the offices of Judge John D. Martin, Judge Marion Boyd and Judge William Miller, for consideration of said Three-Judges in Chambers at that time, or as soon thereafter as the Court shall, in its prerogative so consider said Motion.

F. B. Gianotti, Jr., James M. Manire.

Certificate of Service (omitted in printing).

[fol. 77] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

MOTION TO AMEND ANSWER AND RULE ON MOTION IN CHAMBERS—Filed November 2, 1960

Now come the defendants and move to amend their answer heretofore filed by adding thereto the following:

Fifth Defense

These defendants for their fifth defense aver that this Court should not take jurisdiction of this action in the light of the principle of abstention and recognizing the principle of equity and comity, or should stay the proceedings and require the complainant to take appropriate action in State Courts of competent jurisdiction to declare their rights under the statute in question. The defendants aver that the Courts of the State of Tennessee are open to complainant or representatives of their cause.

Defendants aver that the statute is open to interpretation and that the State Court should be allowed to pass on said enactment in view of the furtherance of Federal-State relations and because of the position taken by the various defendants herein.

[fol. 78] Defendants request said Motion be granted for the following reasons:

a. That justice recognize that the defendants be allowed to amend their answer;

b. That the amendment is necessary to clarify the issue and expedite the discharge of the litigation;

c. That the complainant has moved for summary judgment necessitating the amendment;

d. That the amendment is to plead as a defense an applicable rule of law.

Defendants further move that the Three-Judge Court accept and rule on said Motion to Amend the Answer in Chambers pursuant to Rule 77 of the Federal Rules of Civil Procedure, and that said amendment be allowed before the date set for the convening of said Three-Judges for the setting of this case on November 9, 1960.

F. B. Gianotti, Jr., James Manire, Attorneys for Defendants.

Certificate of Service (omitted in printing).

[fol. 79] [File endorsement omitted]

United States District Court for the Western District of Tennessee Western Division

[Title omitted]

Order Allowing City of Memphis to Amend Answer —November 9, 1960

Upon motion of the defendant, City of Memphis, heretofore made to the Court,

It Is Ordered that said defendant be, and hereby is, allowed to amend its answer by adding thereto a "Fifth Defense" as follows:

Fifth Defense

The defendant for its fifth defense avers that this Court should not take jurisdiction of this action in the light of the principle of abstention and recognizing the principle of equity and comity, or should stay the proceedings and require the complainant to take appropriate action in State Courts of competent jurisdiction to declare their rights under the statutes and regulations in question. The defendant avers that the Courts of the State of Tennessee are open to complainant or representatives of their cause.

Defendant avers that the statutes and regulations are open to interpretation and that the State Courts should be

allowed to pass on said enactment in view of the furtherance of Federal-State relations and because of the position taken by the defendant herein.

Enter this 9 day of November, 1960.

John D. Martin, U. S. Circuit Judge.

Marion S. Boyd, William E. Miller, U. S. District Judges.

O. K. for Deft. City of Memphis, F. B. Gianotti, Jr., Atty., J. M. Manire, Atty.

[fol. 80] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title omitted]

ORDER ALLOWING DOBBS HOUSES, INC. TO AMEND ANSWER —November 9, 1960

Upon motion of the defendant, Dobbs Houses, Inc., heretofore made to the Court,

It is Ordered that said defendant be, and hereby is, allowed to amend its answer by adding thereto a "Sixth Defense" as follows:

Sixth Defense

The defendant for its sixth defense avers that this Court should not take jurisdiction of this action in the light of the principle of abstention and recognizing the principle of equity and comity, or should stay the proceedings and require the complainant to take appropriate action in State Courts of competent jurisdiction to declare their rights under the statutes and regulations in question. The defendant avers that the Courts of the State of Tennessee are open to complainant or representatives of their cause.

[fol. 81] Defendant avers that the statutes and regulations are open to interpretation and that the State Courts should be allowed to pass on said enactment in view of the furtherance of Federal-State relations and because of the position taken by the defendant herein.

Enter this 9th day of November, 1960.

John D. Martin, U. S. Circuit Judge.

Marion S. Boyd, William E. Miller, U. S. Dist. Judge.

O.K. John M. Heiskell for Dobbs Houses, Inc.

[fol. 82]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

Civil Action No. 3934

JESSE TURNER, Plaintiff,

vs.

CITY OF MEMPHIS, DOBBS HOUSES, INC., and W. S. HAVERFIELD, Defendants.

Transcript of Proceedings—November 9, 1960

[fol. 83] Be It Remembered That the above styled cause came on to be heard on this the 9th day of November, 1960, at nine-thirty o'clock A. M., at Memphis, Tennessee, before a three-judge court composed of Honorable John D. Martin, Judge of the Sixth Circuit Court of Appeals, Honorable William E. Miller, Judge of the United States District Court for the Middle District of Tennessee, and Honorable Marion S. Boyd, Judge of the United States District Court for the Western District of Tennessee, when and where proceedings were had and evidence was introduced, as follows:

APPEARANCES:

For the Plaintiff:

Constance Baker Motley
10 Columbus Circle
New York 19, New York

R. B. Sugarmon, Jr.
588 Vance Avenue
Memphis, Tennessee

A. W. Willis, Jr.
588 Vance Avenue
Memphis, Tennessee

B. L. Hooks
588 Vance Avenue
Memphis, Tennessee

B. F. Jones
211 South Third Street
Memphis, Tennessee

[fol. 84] For the Defendants:

Mr. Frank B. Gianotti
Commerce Title Building
Memphis, Tennessee

Mr. James Manire
Home Federal Building
Memphis, Tennessee

Mr. John Heiskell
Commerce Title Building
Memphis, Tennessee

Mr. R. G. Brown
Commerce Title Building
Memphis, Tennessee

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Martin: Before we take up the hearing in the three-judge court case, are there any matters any attorney desires to present to the regular judge of the Court, the Honorable Marion S. Boyd?

(Proceedings in re other matters)

Judge Martin: Are there any further matters to be presented to Judge Boyd?

If not, Mr. Lloyd Johnson, will you call case number 3934, Jesse Turner vs. City of Memphis and Dobbs Houses.

Attorney Sugarmon: Ready.

Judge Martin: Yes, sir. All right.

[fol. 85] Mr. Gianotti: All right. Your Honor, we have heretofore filed an answer and counsel was served a copy of it, relying on the doctrine of abstention.

Judge Martin: Is there any objection? Is there any objection to amending it, is there?

Mrs. Motley: May it please the Court, plaintiffs don't object to amendment to any pleading where it is necessary to do substantial justice. I don't know that this is an amendment to state a defense. It seems to me it is an argument as to why the Court should not exercise its jurisdiction at this time. It seems to me that if it is an amendment, it is certainly out in time under the rules. But we don't object to the amendment per se, but we certainly oppose the idea that this Court should at this time invoke the doctrine of abstention.

Judge Martin: We understood you could properly interpose a defense. But do you object to amending the pleading? That is all I was asking.

Mrs. Motley: No, sir.

Judge Martin: Thank you.

Mr. Gianotti: Do you have the order, Mr. Clerk?

(Discussion)

[fol. 86] Judge Martin: Well, what would be the appropriate order of presentation?

Counsel don't answer on either side—.

Mrs. Motley: Well, we are prepared, Your Honor, to proceed with the plaintiff's case.

Judge Martin: Well, that is what I thought would be the order, but I wanted to see that that is agreeable, in view of the motions and things that we have.

It is agreeable to both sides that the plaintiff proceed?

Mr. Heiskell: Yes, sir.

Mr. Gianotti: Correct; very well.

Mrs. Motley: May it please the Court, as I was reading the answer which has been filed by the Dobbs House, they neither admit nor specifically deny the allegations of the complaint with respect to the plaintiff's presence in the Dobbs House Restaurant on the date in question. And there, I consider that under the rules they admit those allegations. But we would like to put the plaintiff on to supplement the allegations of the complaint with respect to that.

[fol. 87] Judge Martin: Very well, you may proceed to do that.

Mrs. Motley: Turner, will you come around.

Jesse Turner, the plaintiff, called as the first witness, having been first duly sworn, testified as follows:

Direct examination.

By Mrs. Motley:

Q. Mr. Turner, would you please state your full name for the record?

A. Jesse H. Turner.

Q. Are you the plaintiff in this case?

A. I am.

Q. How long have you been a resident of the City of Memphis?

A. I have been a resident here approximately thirteen years.

Q. Did you attend school in Memphis?

A. Yes, sir, I did.

Q. What institution did you attend?

A. I attended LeMoyne College.

Q. Mr. Turner, what is your present occupation?

A. I am executive vice-president and cashier of the [fol. 88] Tri-State Bank.

Q. Do you hold any public position?

A. Well, I am a member of the Shelby County Democratic Executive Committee.

Q. Mr. Turner, in connection with your business and work with the Democratic County Committee, how often would you say you have occasion to use the Memphis Municipal Airport?

A. I would say three or four times per year.

Q. Now, in your complaint you alleged that on April 28, 1959, you went into the main dining room of the Dobbs House Restaurant. Have you been there on any other occasion?

A. Yes, I was there on a subsequent occasion, too, on a subsequent occasion to use the Dobbs dining room.

Q. Do you remember the date?

A. It was October 29, 1959.

Q. And what happened on that occasion?

A. On that occasion I went in and asked to be served, and I was met at the entrance I suppose by a person who was that she was a hostess,—and I was informed—I asked for service, and I was informed that I would have to use another little room off to the side there just to [fol. 89] the south of the room where I went. And I asked her why. She said because I was a negro and because the state law prevented that. I went over to the other room and told her I would like to see the manager. I went over and introduced myself to a man who said he was Mr. Haverfield. He was the manager in charge of the restaurant. And I also asked him about why I couldn't use the eating facilities there, and he said that the state laws prevented it.

Mrs. Motley: I think that is all, Mr. Turner.

Mr. Gianotti: No questions, Your Honor.

Mr. Heiskell: We have no questions.

Judge Martin: The Court has none.

Judge Boyd: Stand aside.

(Witness excused.)

Mrs. Motley: We would like to call Mr. Crutchfield, the Comptroller for the City of Memphis.

[fol. 90] CHARLIE WADE CRUTCHFIELD, the next witness, having been first duly sworn, testified as follows:

Direct examination.

By Mrs. Motley:

Q. Mr. Crutchfield, would you please state your full name for the record?

A. Charlie Wade Crutchfield.

Q. And what is your position?

A. My occupation?

Mrs. Motley: Yes.

A. Is Comptroller for the City of Memphis.

Q. You were subpoenaed to bring with you in this hearing certain records. Have you brought those records, Mr. Crutchfield?

A. Yes.

Mrs. Motley: I would like this copy of lease marked for identification.

Mr. Gianotti: No objection, Your Honor.

Mrs. Motley: We would like to have it marked.

(Said photostatic copy of document was accordingly marked as Plaintiff's Exhibit 1 to the testimony of Mr. Crutchfield, and same will be found among the exhibits in [fol. 91] the cause.)

Q. Mr. Crutchfield, I would like to show you Plaintiff's Exhibit 1 and ask you if you can identify that document?

A. Yes, I can identify the signatures that appear on that document.

Q. And what is it?

A. I can tell that that is a copy of it.

Q. And what is the document?

A. What is the document—?

Q. That you have in your hand, yes.

A. That is a lease contract between the City of Memphis and Dobbs Houses, Incorporated.

Q. And is it a lease and an extension of a lease agree-

ment together? Are those the two documents you have there?

A. I did not—some sort of lease agreement, and I did not get it.

Q. Is it a lease and extension of lease agreement?

A. I will have to read it; I don't know.

Q. Will you look at the top document and then the one underneath?

A. It is an extension of—.

Q. And the document underneath, if you will lift up the front page to the document underneath the lease itself.

[fol. 92] A. That is a lease dated the 21st day of April, '53.

Mrs. Motley: Thank you.

We would like to have that in evidence, Your Honor.

Judge Martin: Let it be received and properly identified.

Q. Now, Mr. Crutchfield, does the City of Memphis have any agreement with any Federal agency for financial assistance for the construction, maintenance or operation of the Memphis Municipal Airport?

A. Yes, they have agreements. As to how many—I have twelve since 1941 in my hand.

Q. Do you want to tell us what those agreements are?

A. The latest—

Mr. Gianotti: Pardon me, Mr. Crutchfield.

In order to save time, I might suggest to counsel, if she cares to, to ask the question whether or not there are any matching funds agreements relating to construction of the terminal building at the airport, then. And we can go from there.

That is only a suggestion. If she would care to take it, I [fol. 93] think it would save time.

Mrs. Motley: Yes.

Mr. Gianotti: In other words, there are many agreements, counsel, between the Federal Government and the City of Memphis. But if I may make this statement at this time, we have checked and there is no agreement between the City of Memphis and the Federal Government relating to any funds used in the construction of the airport terminal building, nor has there ever been.

Q. Do you have any matching fund agreements between the City of Memphis and some Federal agency?

A. We have matching agreements between the City of Memphis and several agencies.

Q. Would you explain what those matching agreements are?

A. Well, usually they define what are eligible costs, and usually they will pay fifty percent of the cost up to a maximum which they stipulate in the agreement. And that is about it.

Q. And the funds which—what are the funds which—do the funds relate simply to the construction of the airport and not to the terminal building?

[fol. 94] A. There is none relating to the terminal building, none whatever.

Q. Are there any agreements relating to the construction which is presently going on at the airport, that terminal building?

A. The only agreements—the only current agreements are, one, in regard to the north-south runway, and two, in regard to the control tower; they are the only two current grant agreements.

Q. Now, the funds with which the terminal—the existing terminal I am referring to,—the funds for the construction of that building are wholly t[illegible] state and city funds?

A. Yes.

Q. And the funds for the construction of the present terminal is wholly state and city funds—are wholly state and city funds?

A. You are speaking of—wh t is—? Will you repeat the last question?

Q. I am sorry. I am now speaking of the new terminal under construction.

A. Yes.

Q. And the funds for the construction of the terminal—[fol. 95] the new terminal—are those funds wholly state and city, or wholly city?

A. I tell you the truth, I am not sure whether the state is going to participate. It will be city. Whether the state will participate, I don't know.

Q. Now, I would like to see the agreements which you

have referred to relating to the presently existing construction agreements. Do you want to—?

A. Yes, these two.

Mrs. Motley: We would like to have these marked for identification.

Mr. Gianotti: If Your Honor please, those are original documents, and we would ask that counsel make copies. We certainly would be at a loss to run the City of Memphis if we don't have the original documents.

Judge Martin: You want photostats, then?

Mr. Gianotti: Yes, sir.

Judge Martin: Is that agreeable?

Mrs. Motley: Yes, sir.

Judge Martin: Then you may have the Clerk here photostat them, and then he will return the originals to the custody of Brother Gianotti.

[fol. 96] Mr. Gianotti: Thank you very much, Your Honor.

Judge Martin: Or the gentleman who has custody and control.

Mrs. Motley: Your Honor, we would like those marked for identification. And we would like to introduce them into evidence.

Judge Martin: Let them be received and properly identified.

(Said documents were accordingly marked as Plaintiff's Exhibits 2 and 3, respectively, to the testimony of Mr. Crutchfield, and same will be found among the exhibits in the cause.)

Judge Martin: With the understanding they will be photostated, is that right?

Mrs. Motley: With that the plaintiffs rest, Your Honor.

Judge Martin: O. K. Is there direct proof for the defendant?

Mr. Gianotti: Would Your Honor give us just a minute, please?

Judge Martin: Yes, sir, take your time.

Mr. Gianotti: You may come down.

[fol. 97] (Witness excused.)

Judge Martin: Frank, do you want something?

Mr. Gianotti: I thought I might make a general statement at this time, if the Court please.

Judge Martin: First, do you want to put on proof?

Mr. Gianotti: First, we think it does not appear to us at this time we will have any proof to offer.

This Was All the Evidence Introduced at the Hearing of the Cause.

Judge Martin: All right, go ahead with your statement.

ARGUMENT OF MR. GIANOTTI

Mr. Gianotti: The answers of the City of Memphis, Dobbs Houses, and W. S. Haverfield, are alike up to a certain point, if it please Your Honors.

As a broad statement, we refer to the state law and to regulations relating to the operation of restaurants. That is of course,—is as I say the prime position—the first position of Dobbs Houses. And as lessor, the City of Memphis [fol. 98] is also interested in knowing what the law is.

The second point involves a statute originally passed in 1875, which in substance—in the pleadings, if Your Honors please,—in substance it is the position of the City of Memphis as lessor, and also of Dobbs Houses, Incorporated, that that gives both to the Dobbs Houses and to the City of Memphis as lessor the right—primarily to Dobbs Houses—to serve whomsoever they might choose to serve. That statute we think is clear.

We after considerable research, if Your Honors please, we have found one case, the Lasater case, in 68 Tennessee. And since this research continued on up within the last day or two, this case is not in the memorandum which we have filed. But with the Court's permission we would like to file an additional memorandum for the convenience of the Court.

Judge Martin: All right. But in the meantime give us the citation.

Mr. Gianotti: All right. It is State versus J. M. Lasater, in 68 Tennessee, at page 583.

This case involved an indictment which was quashed by the Criminal Court, and the Attorney General appealed.

It was predicated upon the second section, and that is the [fol. 99] section that gives the right of choice in the Act of 1875, Chapter 130, which is still carried in the Code in the section number designated as 62-710.

The Court had this comment in reversing the action of the trial court. It stated that it was a sufficient indictment under the law and a valid statute as against the attack made in this particular case. It is not clear from the factual situation stated that the attack is similar to the attack being made in this case. The language of the case indicated there was some turbulent or riotous action, that one of the points there being indefinite turbulent or riotous—that the attack would be good. The other attack made the basis being the act being broader than the caption and having, if Your Honors please, more than one subject matter. The Court held they were related, that it did not violate the Tennessee constitution by having the body of the act broader than the caption.

So those were the two main points involved.

But I would like to read briefly from the case to point out that the situation, while apparently the present—at least, [fol. 100] I can't tell from reading the case that it involved the color situation. The Court said this at page 461:

> "This is an extraordinary statute. It is generally understood to have been passed to avoid the supposed effects of an act of Congress on the same subject, known as the civil rights bill. And it is left now to the court to determine whether there be any valid constitutional objection to it."

At page 463, in answering one of the attacks made, the Court said this:

> "We are aware of no construction of this clause by our courts. But we hold, that in any event the punishment prescribed, although severe, more so than in other kindred offenses, is not so cruel and unusual as to authorize the courts to declare the act void, even if we could do so in any case."

The other point of attack involving this act—

> "We know of no technical definition of 'turbulent conduct' that renders it impossible for one man to be guilty of turbulent conduct, and if the argument be [fol. 101] sound as to riotous conduct, the terms turbulent or riotous conduct is used in the alternative, and a charge of either would be sufficient."

Now, the statement that is presently being made, may it please Your Honors, is of course tied in with this thought that the Supreme Court of the State of Tennessee, as far as we have been able to determine, has not construed this statute in the light of present day problems. And it is our broad position to the same extent that we argued recently in the Evers case that under the rule of abstention so solidly entrenched after the Supreme Court decision in the Harrison case, then certainly this Court would consider abstaining until the Supreme Court of the State of Tennessee rendered a decision growing out of facts similar to the ones being presented here.

Judge Martin: The Harrison case—?

Mr. Gianotti: Yes, sir.

Judge Martin: Was there any appeal in the Evers case?

Mr. Gianotti: There has been no further information. I talked with one of the counsel yesterday, and as far as [fol. 102] I know the record is in the same condition it was after the entry of final judgment on the opinion of the three-judge court.

Judge Martin: What about the time? Have you checked the time? What I mean is has the time for appeal passed?

Mr. Gianotti: I think the thirty days has long since elapsed, yes, since the entry of the final judgment,—is that right? I am sure it is, Your Honor. It was entered in September, wasn't it? I am sure it was, Your Honor, the opinion of the Court.

Judge Martin: Practically the same counsel involved in this case as the other on both sides, is that correct?

Mr. Gianotti: Yes, Your Honor.

Judge Martin: Except you don't have as many on your side.

Mr. Gianotti: Got some big ones, though. Got some big ones both in stature and in other qualities.

Judge Martin: Well, but a lot of good lawyers on both sides.

Mr. Gianotti: In fairness to the Court, maybe we would —maybe we should make a further statement. If the Court [fol. 103] would rather have it by proof, we can offer it, but I think it is a matter that the Court can take judicial knowledge of.

In trying to get over to the Court that this is not a specious type of presentation, we are firmly convinced and we think the Court, in view of the opinion rendered by this same Court in the Evers case, realizes that there are certain matters that should be passed on. The Harrison case certainly indicated that strongly,—should be passed on by state courts.

Now, this case, while a holding of the Supreme Court in connection with this same statute does not in our opinion pass directly on the same questions that are being raised here, there are other cases, if Your Honors please, that our research has indicated have not been finally concluded. One of them—we checked them out recently,—maybe counsel would enlighten the Court, being associated in those cases perhaps, and knowing more about them than we would,—but in checking the material that we have, there are at least—is at least one or perhaps two cases pending in the Supreme Court on certiorari. While we do not admit [fol. 104] they would be controlling in this particular situation, we do feel they might throw considerable light on this situation. That is all.

And I am not arguing the case for Dobbs Houses. Mr. Heiskell can present his own argument.

But we as lessors, the City of Memphis, are interested in knowing what the law is that—what the law is so that we may be guided in our future actions.

There is at least one or perhaps two cases that are pending on certiorari in the Supreme Court involving the right of people to serve whomsoever they wish to serve. And in one statement here in this court, in this case here, they used the expression I think in the statute, "to the same extent that a person might act in his own private home."

In other words, that they have the same right in public places to do things that they could do in their own private home. In other words, you can invite whomsoever you wish to invite to your own home.

And we think that is largely the situation here, that with commercial operators that these people—

Judge Martin: Well, how similar do you think this case is to that decided in the Fourth Circuit in which a long-[fol. 105] time eminent Circuit Court Judge Soper in Maryland wrote the opinion? I think you are both familiar with it.

Mr. Gianotti: Yes, sir, I am familiar with the case. I don't have it right here in front of me, Your Honor. But if that is the case I am thinking of—

Judge Martin: I have the opinion in the case on the bench here, which we just saw by research. You might see it, read it, Williams against Howard Johnson.

Mr. Gianotti: Yes, sir. We have that cited in the memorandum that I think has been filed with Your Honors some time ago.

Judge Martin: Well, I read the case—

Mr. Gianotti: Yes, sir. It is the Howard Johnson case, and that case is on certiorari to the Supreme Court at this time.

And another case—I think Baltimore case you have there.

Judge Martin: What I was concerned with in calling your attention to that case is whether or not you think there it has sufficient similarity—

Mr. Gianotti: Yes, sir, we rely on it.

Judge Martin: (Continuing) —To the issue at bar. It [fol. 106] is not controlling because it is from a different circuit. But it is received with high respect, as we do decisions of the Courts of Appeals in other circuits, not from the Sixth Circuit, in other words.

Mr. Gianotti: Yes, sir.

Judge Martin: However, it would not be binding, as would a Supreme Court opinion. But being from another circuit and by I would say an eminent judge, I would think Judge Soper by the profession generally is regarded as one of the ablest judges in the country,—I so regard him.

Mr. Gianotti: Yes, sir. There is a statement Your Honor no doubt has reference to that is as follows:

> "The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

As stated by the Supreme Court in Shelley vs. Kraemer, —that statement is now from Williams vs. Howard Johnson, and decided July 15, 1959. And of course we rely on that case, Your Honor, as referred to in our memorandum.

Judge Martin: Well, now,—

[fol. 107] Mr. Gianotti: But this statute we are talking of—

Judge Martin: Howard Johnson Restaurants were found —, in going around the country with my young buddy and colleague at the time, Marion Boyd, Jr., from Florida to Detroit, Michigan, I think we totalled—we ate at thirty-two Howard Johnson restaurants. I don't recall that any one of them was at an airport where we had lunch or dinner or maybe ate breakfast,—or in a railroad station, but of course they were used by people in interstate travel, but not a terminal of any sort.

Now, do you say at the same time that such trade Howard Johnson is serving is the character that Judge Soper decided for the Court by writing that opinion?

Mr. Gianotti: Well, there having been a Federal act involved in this way in that case, it says this: The fact that the restaurant served some persons travelling from state to state was held not in and of itself to be engaged in interstate commerce but as an instrument of local commerce [fol. 108] was at liberty to deal with such persons as it may select. So to that extent it was mentioned in the Howard Johnson case.

Judge Martin: Now, that was probably dicta, then, dicta in the case?

Mr. Gianotti: Yes. Now, counsel evidently have sought to rely on the fact that by asking Mr. Crutchfield these questions abo Federal monies, but it just so happened that the old airport—that is, the last addition that was made to it, was paid for with city funds. And the new

terminal building—when some question came up as to whether or not the City of Memphis could get matching funds for the terminal building. Colonel Baker is available to make the statements to the bench if counsel should so desire—but we were unable to get any matching funds in connection with the construction of the terminal building. In other words, they are taking the position, those handling Federal funds, that they are not spending any Federal money for the terminal building. So that point certainly would not appear to be present in this case.

Now, in a couple of other cases we have referred to in [fol. 109] the additional memorandum which we would like to file, if Your Honors please, where they made the point as to whether or not the property—being public property—whether or not it should come within the terms of the Fourteenth Amendment or surplus property or whether it is really a part of the tax fund.

Now, in one case they held where it was surplus property, they decided not only—the Harry Reid case, 179 Federal Supplement 768,—they refused to issue injunction in that case.

That involved a city-owned arena where there was a question of whether or not they could avail themselves of seating facilities. The three-judge court said principles of comity should be adhered to in order to avoid any disharmony in the public relations field already disturbed by friction. The Court stated that the only position upon which the remedy—and the Court is, in passing, supplying emphasis—and must yield to comity principles where irreparable damage is not clearly shown to be present.

But the statute involved in this case in the State of Tennessee, as far as I know, Your Honor, has never been construed by the Supreme Court of the State of Tennessee. [fol. 110] And it is our earnest argument that of course that court be given an opportunity to do so.

Now, as to what if anything is being done in Memphis, in order to show that this is not a specious type argument that is being made here, there have been, and I am sure the Court will take notice of this,—Judge Miller is perhaps familiar with the library case, maybe much more so than I because I haven't checked with counsel in the last few days,

—but I was present at certain conferences between the Library Board, the Mayor, the City Commissioners of the City of Memphis, and as you know that a public statement has been made concerning future operation of libraries.

Now, right after politics, maybe it might not be amiss to show as an illustrative example of what happened recently in Memphis in connection with the use of the Auditorium facility. Maybe certain parts of the Court will take judicial knowledge of that; maybe another part of the Court wouldn't know anything about that. But that case was pending before Judge Boyd, no plea having at the time [fol. 111] having been filed for a three-judge court, but I think we should make the mention of the fact that we intend to file the same type application for a three-judge court in the Auditorium case if counsel intend to pursue it further.

The policy recently adopted by the Auditorium Commission and approved generally by the City and County officials is that the Auditorium will lease space to lessees. The lessee will have the complete control of the use of leased space. If they want to handle it on a segregated basis with the City of Memphis, the County of Shelby, the Auditorium Commission has not or cannot control over it, they may do it. If they want to handle it on an integrated basis, then they may do so.

The recent lease which I have reference to is use by the local Democratic Committee in connection with the function they had at the airport, at which time there was both colored and white in attendance. So that is factual. And I am sure counsel located in Memphis fully understand it to be a fact. So—

Judge Martin: Wouldn't it be—

Mr. Gianotti: (Continuing) That statement of the matter [fol. 112] is agreed.

Judge Martin: Wouldn't the case—you just—wouldn't fall within the ambit of the Supreme Court decision in the Louisville auditorium case? There the auditorium was in a park in Louisville, and the Supreme Court held, correctly in that case, where the City has leased the park to a concern, you may call it, to operate a summer theater there, that that had to be on an integrated basis.

Mr. Gianotti: Yes, sir. Well, that is—

Judge Martin: The Sixth Circuit Court of Appeals was reversed by the Supreme Court in that case.

Mr. Gianotti: If Your Honor please,—

Judge Martin: Don't want to cut you short, Brother Gianotti. Just want to point out it would seem to fall in the category at least of this Louisville case where you were speaking of the auditorium.

Mr. Gianotti: Yes, if Your Honor please.

ARGUMENT BY MR. HEISKELL

Mr. Heiskell: The position of Dobbs Houses in this matter is substantially that stated by the City, with the additional complex problem that we have, that we have [fol. 113] claimed here of the regulation of the Department of Conservation made pursuant to a statute, which provides that you shall furnish facilities in restaurants for the races, and makes it a misdemeanor.

And we think that is a proper matter. It has never been construed by the state once. And we have relied on the doctrine of abstention.

And I would say first of all that we operate a private restaurant under a lease with the City, that they have no control over the operation of the restaurant, and that under both the statute which Mr. Gianotti has mentioned and under the common law that has been recognized, that in the operation of a restaurant we have the right to serve whom we please, if we please. But that should we agree or want to serve both negroes and whites in the same restaurant facility, we would then be in the direct violation of the state regulation made pursuant to that statute. And that in addition we would be offending the unlawful activities clause of the lease, which would make the lease subject to forfeiture.

And we think that we are entitled and that it should be properly brought in the state court on the interpretation of the validity of the statute and of the regulation, so that we would know what the law is.

[fol. 114] And that, simply stated, as we say first of all that we are operating a private facility, and have the right

to control that activity under the Tennessee statute and under the common law. And secondly, that we are faced with the regulation of the Department which makes it unlawful for us to do other than we are doing, and that regulation has not been the subject of interpretation in the state courts.

Judge Martin: We will now hear from the plaintiffs.

ARGUMENT BY MRS. MOTLEY

Mrs. Motley: May it please the Court, the plaintiffs previously submitted their memorandum of points and authorities. It was submitted in connection with the motion which we made earlier in this case for a summary judgment. And we did not submit a new one because we would only be repeating the authorities already cited.

In that memorandum of points and authorities, we cite the case of Coke against the City of Atlanta, Georgia. And at that time that case had not been reported. But that case is now reported and I would like to give the Court the citation.

[fol. 115] Judge Boyd: Do you have a copy of your points and authorities for the other judges? I am not sure that I have it. Do you have copies of the points and authorities for the other judges?

Mrs. Motley: We have two copies here, sir.

(Documents passed to the Court.)

Mrs. Motley: I would like to point out that the Coke case is now reported. That is one of the cases which we cited in our memorandum.

Judge Martin: Which one is that?

Mrs. Motley: The Coke case, C-o-k-e. Coke against City of Atlanta.

Judge Boyd: The top of page 3 there, Judge Martin. What is the citation?

Mrs. Motley: The citation is 184 Fed. Supp.

Judge Martin: 184. Wait a minute.

Mrs. Motley: 579.

Judge Martin: 579. Thank you.

Mrs. Motley: Now, that is a case which is identical with the case which is now before this Court, in that it involves the Atlanta airport, and the same defendant, Dobbs Houses Restaurant.

[fol. 116] That case was decided by a one-judge District Court. And in that case the Court held that the lessee in that case, Dobbs Houses, which is the same corporation here, was engaged in state action in violation of the Fourteenth Amendment when it segregated negroes in the restaurant in the Atlanta airport.

Now, on page 583 of that opinion—, I am reading from the opinion, the Court says:

> "The decisive question presented here is whether the action of the lessee, Dobbs Houses, Incorporated, may fairly be said to be the conduct of the City of Atlanta and thus state action."

Now, it seems to us that this is the precise question involved in this case. I think the facts are similar, in that a negro went into the Dobbs Houses Restaurant and they attempted to segregate him in a corner behind a screen. Here the plaintiff went into the Dobbs House Restaurant there and they wanted him to sit in a separate room in order to be served. In that case, as here, we have a municipally owned airport. In other words, we are dealing with public property, no private property at all involved here. And that public property has been leased to a private corporation. [fol. 117] And the only question which this Court could properly decide in this case is whether the action of the lessee is state action in violation of the Fourteenth Amendment, whether a lessee comes under the Fourteenth Amendment. And the Court held in this case that the lessee came under the Fourteenth Amendment because he was operating a restaurant for the benefit of the public in a public facility.

Now, in the Coke case the Court cited the case of Derrington against Plummer, a case which we also cited in our memorandum. That is a Fifth Circuit case. The Supreme Court denied certiorari in that case. I am sorry I did not note that in my memorandum, but I will be glad to get that citation if the Court feels necessary.

In Derrington against Plummer there was involved a

restaurant or court house cafeteria in Texas, and the restaurant was leased by the municipality to a private corporation or individual to operate a restaurant for the benefit of people using the court house. And of course there, as here, the private owner contended that he had a right as a private owner to serve whom he pleased. And the Fifth Circuit held that he didn't have that right because he was operating a restaurant for the benefit of those people that used the court house in a public building, in [fol. 118] that the lease had been made to him for the purpose of operating a restaurant in the court house, and since this was public property he was under the Fourteenth Amendment.

Now, the reason I stress that case is because that case was cited with approval by the United States Supreme Court in Cooper against Aaron, which I cite there. And that was a case which involved the Little Rock school situation. But nevertheless the Court undertook to point out in that case that the lessee of public property was not exempt from the prohibitions of the Fourteenth Amendment. And they specifically cite Derrington against Plummer for that proposition because there was involved, although not decided by the Court, a number of statutes passed by the State of Arkansas and a contemplated lease of public school property by the defendants in that case. And so the Supreme Court pointed out that the lease of public property—the lessee of such property comes under the Fourteenth Amendment.

Now, as Your Honors pointed out a few minutes ago, the Sixth Circuit Court in the Muir case had ruled that [fol. 119] a private leased amphitheater in Louisville was not under the provisions of the Fourteenth Amendment, and that judgment by the Sixth Circuit Court was vacated by the United States Supreme Court, and returned to the Sixth Circuit for consideration in light of present conditions and the Supreme Court's decision in Brown against Board of Education at Topeka, as I recall it.

So that this is a question that has been clearly considered by the United States Supreme Court and has been decided by the Supreme Court and lower Federal Courts that lessees of public property, when they are operating that

property for the benefit of the public, are not exempt from the prohibitions of the Fourteenth Amendment.

So that the only question before this Court—and I think there is no question that the law is that this lessee is under the prohibitions of the Fourteenth Amendment to the Federal Constitution.

Now, these other matters involving the state regulation and state statute are things which they are attempting to inject into this case and which are not in any way necessary to a decision of this case by this Court.

[fol. 120] Judge Boyd: Did Judge Soper make reference to these cases you are talking about, the Texas case and the Atlanta case, in his opinion in the Johnson case? Maybe that is not the one I am thinking of.

Mrs. Motley: No, the Johnson case did not involve a lease of public property. The Johnson case involved a private restaurant on a public highway with—

Judge Boyd: Well, I believe it was a case Mr. Gianotti cited, the Wilmington parking authority case against—

Mr. Gianotti: Reid.

Judge Boyd: Is that the situation?

Mr. Gianotti: Against the City of Norfolk.

Judge Boyd: Reid vs. Norfolk,—the opinion by Judge Wolcott. Did you see that opinion? He seems to review all these cases. I am just wondering—I haven't checked it—if he makes reference to the ones you cite at this time?

Mrs. Motley: Yes, sir, Your Honor. I think that is decision by the highest court in the State of Delaware, and not a Fourth Circuit opinion.

Judge Boyd: That is a parking lot operated by the city?

Mr. Gianotti: That is that Delaware case.

[fol. 121] Judge Boyd: And the restaurant under lease in connection with it?

Mrs. Motley: Yes, sir.

Judge Boyd: Then does Judge Wolcott make reference to these cases pointed out?

Mrs. Motley: Yes, he does, Your Honor. But there he points out the city had determined this was surplus property no longer needed by the public—the City, and endorses that case—, well, the case I have just cited on that, then.

Judge Boyd: Yes, he seems to make reference to Derrington against Plummer.

All right.

Mrs. Motley: Well, there has been no declaration here by the City of Memphis that the airport is surplus city property, I don't believe, so I don't think this is the same case as that Bearden case.

Now, the statute to which the defendants refer, this 1875 statute, obviously isn't involved in this case because the statute there gives the owner of a private restaurant the right to select his own customers. Here we are dealing with the question of whether the lessee of public property [fol. 122] is outside the orbit of the Fourteenth Amendment. And those are not the same questions. That second question raised by the statute is not even involved in this case.

Now, as to the regulation which the Dobbs Houses Restaurant relies on and cites, the regulation is unconstitutional on its face. And there is no construction that the Supreme Court of Tennessee could give to that statute which would prohibit the necessity for this Court deciding this case if the Supreme Court of Tennessee held that statute constitutional or unconstitutional. This Court would still have to decide the question whether the lessee—this lessee here had the right to discriminate against Mr. Turner when he went in that restaurant. So that the regulation there is not necessary or involved in the decision of the question before this Court.

In that connection, I would like to call to the Court's attention a Fifth Circuit case which we did not cite in our memorandum, and I am not suggesting that this Court is bound by the decision of the Fifth Circuit, but it is a case which is similar to this case in respect to the contention [fol. 123] now made that this Court ought to invoke the doctrine of abstention. And I refer this case to the Court. It is Orleans Parish School Board—

Judge Boyd: New Orleans?

Mrs. Motley: Not New Orleans; Orleans, the parish in which New Orleans is located. Orleans Parish School Board against Bush. B-u-s-h.

Judge Boyd: Against Bush?

Mrs. Motley: B-u-s-h, yes.

Judge Boyd: And the citation?

Mrs. Motley: That is 268 Federal 2nd, 78.

Now, that case involved school segregation in Orleans Parish, Louisiana. And a Federal District Court was initially convened in this case. This is just one of the citation. This case has been there many times. But I will get to the point of this case in a minute. But I would like to give a history of this case because I think it is important. The three-judge court was originally convened in that case. The three-judge court met and dissolved, pointing out that there was no real contest as to the statutes involved, that they were clearly unconstitutional on their face, statutes requiring segregation in public schools in New Orleans. [fol. 124] So after the three-judge court met and decided this, it is significant they turned the case over to the District Court, to one judge to proceed. The District Court subsequently entered an injunction enjoining segregation from and after such time as might be necessary to make arrangements there for the integrated schools.

In this particular appeal which I have brought to the attention of the Court, the defendant school board said, "Now, here we have a statute passed by the State of Louisiana which gives to the legislature of Louisiana exclusive power to re-classify schools. And the District Court sitting alone as a single judge has held that statute unconstitutional on its face. It has never been construed by the highest court in the State of Louisiana. And we think that he should have abstained from first declaring the statute unconstitutional, and he should have abstained until that statute was construed by the highest court in the State of Louisiana."

And the Fifth Circuit Court disagreed with him and said, "No, that statute isn't involved. The order entered by the District Court enjoining you as state officials from operating schools on a segregated basis is proper. You still have those schools under your jurisdiction and you [fol. 125] are still operating them, and no problem but you are enjoined, so this statute—it doesn't matter how the statute is construed; it couldn't possibly be construed by the highest court in the state to permit such unconstitutional action."

Then they petitioned for rehearing on this abstention point. And Mr. Justice Tuttle in his rehearing opinion says this:

> "No cause for abstention by the federal court is shown merely because a suit is brought against state officials whose conduct may be affected by untested state legislation. It is only when the federal court is called on to interpret such state statute or rule on its constitutionality that the rule applies."

Now, in this case this Court is not called upon to interpret that state statute of 1875 which gives the owner of a private restaurant the right to choose his own customers. This Court must only decide that the lessee of a public facility may not discriminate against negroes. This regulation—it [fol. 126] does not matter how this regulation is construed by the state court of Tennessee. The construction of that regulation is not necessary to decision of this Court. But, in addition, the regulation is obviously unconstitutional on its face to require segregation—

Judge Martin: Where a long established rule—, before abstention cases you are pointing to—, where a long established rule that the Federal Court would not declare the constitution of a state unconstitutional against the Federal Constitution, or the statutes of a state unconstitutional as against the Federal Constitution, until the state court at the highest level—that is, the highest court of the state, had passed upon the issue. This doctrine didn't come into existence with the abstention cases, I am calling attention, but has long existed, not merely applied to this particular field of litigation. It has been referred to constantly in the courts of the United States before the Brown against Board of Education decision in 1954. And therefore, regardless of how clear it might appear it was to this Court as a Federal Court that the ultimate decision would be a certain way, until after the state court has been given the [fol. 127] opportunity to pass on the question, shouldn't we under this latest authority abstain from setting aside the acts of the state as unconstitutional under the Fourteenth or any other amendment?

Mrs. Motley: No, sir.

Judge Martin: I am going to the historical part of it.

Mrs. Motley: I would like to bring to Your Honor's attention a case which the defendants do not cite. They cite Harrison against the NAACP as authority for this abstaining.

Judge Martin: Yes, the abstaining cases I am talking about—

Mrs. Motley: Yes, sir.

Judge Martin: The doctrine—

Mrs. Motley: The case they don't cite is NAACP against Bennett, which was decided at the same time. In fact, decided a few days after the Harrison case, in 360 U. S. 471.

Judge Miller: What is the style of it?

Mrs. Motley: National—NAACP—against Bennett.

[fol. 128] Judge Martin: You said 360, 47—?

Mrs. Motley: B-e-n-n-e-t-t. That is the Attorney General in Arkansas.

Judge Martin: What is the plaintiff?

Mrs. Motley: NAACP against Bennett.

Judge Martin: NAACP against—?

Mrs. Motley: B-e-n-n-e-t-t.

Judge Martin: Bennett. Yes. Was that a school case?

Mrs. Motley: No, sir.

Judge Martin: 368 U. S. 471?

Mrs. Motley: 471. That was a statute—that was a case involving a statute of the State of Arkansas setting up a State Sovereignty Commission. Then the Federal District Court there referred the case immediately to the state court because the statute had never been construed by the state court. And the Supreme Court immediately after deciding the Harrison against NAACP reversed that and in a per curiam opinion said it just don't automatically refer the case to the state court because a state statute was involved. They sent it back for consideration in the light of Harrison. [fol. 129] And in Harrison they merely point out the Federal Courts don't automatically refer the case to the state court because a state statute which has not been construed is involved.

Going back to the Pullman case, the Federal Court must first decide whether a statute is involved—whether a statute is even involved in the case, and secondly, whether a construction of that statute is necessary before the case can be decided. And thirdly, the Federal Court must find that what is involved is primarily not a matter of local concern, as was the case in the famous Pullman case.

Now, the reason we introduced each of these agreements between the City and the Federal Government is to show that this is not just a matter of local concern. This is a matter of Federal concern, because here the Federal Government is investing money in the development of this airport. And they are doing it because the airport is a matter of national concern. It is involved in interstate commerce. And everybody is concerned as to whether the Dobbs House would refuse to serve Mr. Turner. Every negro who comes into Memphis or leaves Memphis, and [fol. 130] every foreign person of dark skin is involved in this decision. And this is not a matter of purely local concern that this Court can just refer to the state court on the ground that the Federal Courts and the Federal Government have no interest in this matter.

So that on these three grounds this Court cannot properly refer this case to the state court because we have here a matter of national and international concern, because this is an airport which involves interstate and foreign travel.

Judge Martin: Hold there a minute. I ask you what you find to be distinguishable on this point of abstention in this case and the recent decision of this same three-judge court as presently constituted, from which we understand no appeal was taken? Where do you make the distinction between these cases and that? We thought there that there should be abstention. And we put it solely on that grounds—

Mrs. Motley: Yes.

Judge Martin: (Continuing) —As you know, because you were counsel in the case. Now, how do you distinguish this case from the recent case to that effect on the question of abstention?

[fol. 131] Mrs. Motley: Well, in that case, I would like to say this. No appeal was taken for several reasons. But so far as that case is concerned,—the doctrine of abstention

is concerned in that case,—the Court here I assume felt that it could not decide that case without determining whether buses were involved, or segregation of buses, as opposed to street cars,—was involved in that case, and therefore a construction of the statute was necessary to a decision in the case. This Court would have to decide that the statute meant somehow to include buses, although buses were not—buses were not specifically named.

Now, in this case, this Court does not have to do that at all. This Court has to first decide—one, is this a public property or public facility? And secondly, whether the lessee under the law is within the prohibition—the prohibitions of the Fourteenth Amendment. And this Court does not have to go to any statute or even to any regulation to determine that question. And that is how I distinguish this case from the bus case.

Now, in addition, we would like to point out to the Court [fol. 132] that this statute and regulation—or regulation, rather, to which the Dobbs Houses refers and which it claims they would be subject to if they served negroes in the main dining room,—I would like to point out that the Attorney General was notified of this particular case, as I recall, and they are not here. Apparently they have no real concern with the enforcement of this so-called regulation. And in addition,—of course these facts are not before this Court,—but I understand that in other cities in the state where there are restaurants at the airport, the other restaurants in the cities privately owned, and so forth, this so-called regulation which the Dobbs House is afraid of is not even being enforced because negroes are being served there. And the Attorney General is aware of this.

And so that we are dealing with a regulation of statewide application, of course, but it is not enforced. There is no real contest here. And this three-judge court has been convened to decide a matter in which there is no real contest. The State isn't interested in that, and it is not being enforced.

Judge Miller: In this case, is there any request in the complaint that this statute be declared unconstitutional? [fol. 133] Mrs. Motley: No, there is not—

Judge Miller: How did that get into the case? By defense—, or amendment?

Mrs. Motley: Yes, it is raised in the complaint.

Judge Miller: In the Evers case the plaintiff in that case requested a declaration of the unconstitutionality—?

Mrs. Motley: Yes, sir, specifically did.

And the case, now, of NAACP against Harrison, the NAACP in its complaint in the District Court requested a three-judge court determine the constitutionality of certain statutes and to enjoin the enforcement of those statutes, and those are very long, complicated statutes which the construction of which was necessary to the decision of that court. And the District Court construed them. And that was why the Supreme Court in that case invoked the doctrine of abstention and said all these statutes ought to be construed by the state court, plus the fact that there are many cases which point out that a three-judge court can't be convened just because somebody would like some statute construed for his own information or future information or some future case.

[fol. 134] It is only where the plaintiff seeks to have the Court enjoin the enforcement of a state statute or state regulation that a three-judge court is required. And we didn't ask the Court to enjoin that 1875 statute for the obvious reason it is not involved. And we did not ask for a three-judge court for this regulation because, first of all, it is unconstitutional on its face. There is no question about it.

And the Fifth Circuit has held in a bus case and other cases with which this Court is probably familiar, that where a statute is obviously unconstitutional, it would not convene a three-judge court for that purpose.

So that I think that here we have a situation first where there was really no need for a three-judge court. And nevertheless, now that this Court has convened, this Court can proceed to decide that it is not properly a case for a three-judge court and refer the case to a single judge for disposition. I think that that would probably be the proper procedure here, although this case could—the Court could find that this regulation is unconstitutional on its face also. And I think that clearly is—there is no question that that

[fol. 135] regulation would not be upheld by the United States Supreme Court.

Judge Martin: Any other speaker for the plaintiff? Is there any other speaker for the plaintiff?

Mrs. Motley: No, sir.

Judge Martin: You may reply.

FURTHER ARGUMENT BY MR. GIANOTTI

Mr. Gianotti: Your Honors please, on this question about the use of property, publicly owned, counsel seems to take the position that simply because it is publicly owned that therefore her case results by that.

And we don't take that position, of course, if Your Honors please.

It is our position that any fair approach to the situation would have to concede, in the first place, that it is not absolutely necessary to have a restaurant at the airport. Anyone can simply read the Dobbs House lease as written, and then turn it around and read it another way in light of counsel's argument how it should be written or how counsel contends that it should be interpreted. And I am reasonably sure under present conditions—present condition—that the dollar sign on that lease as presently written [fol. 136] with the City of Memphis would be far less than the dollar sign if it had been written or interpreted in the light of counsel's contention.

Now, that is just the factual situation.

Now, we say that to the extent that the argument is reasonable that this could be considered as surplus property to the—simply operation of an airport. In other words, you could get where you want to go and come back without a restaurant. A restaurant facility is added to relieve the taxpayer of the additional burden that the City would be under were it not for the profit-making leases.

Now,—and we say this statute is most important to the City of Memphis and to Dobbs Houses. Now, that is a private corporation. They make that decision. It simply says that the usual, customary provisions—that they shall not violate any laws.

Now, they are in the position of apparently saying that, "We don't want to serve Mr. Turner." Now, is that their

right, or are they violating some constitutional right in this case?

[fol. 137] We just can't see it, if Your Honors please, because that is not property in the sense—public property in the sense that counsel is trying to make it appear.

The City does, if you want to proceed on it,—I don't know—that is a convenience—in a proprietary capacity—the City does many things in a proprietary capacity. We operate the Light, Gas & Water Division in a proprietary capacity.

Judge Martin: Brother Gianotti, that comes to my mind naturally because the Court on which I sat was reversed on the Louisville case,—that was leased by the City of Louisville to a private operation for the purpose of having summer opera. The park was rather like the Shell here in Memphis,—not as good—it has a pretty park,—I went out there when I was holding court some years ago,—didn't attend the performance but I saw the place. And there where the City of Louisville leased that property,—we were reversed—the Court of Appeals reversed—Martin was sitting among the three,—and I think really, if I am not mistaken, in holding that that was a private operation and the Fourteenth Amendment did not come into it. We wrote a very strong opinion to that effect.

[fol. 138] Now, how do we get away from that situation here to this board for entertainment in public parks where colored people were excluded, as against a restaurant where they are excluded, where a restaurant was leased—, the property on which it exists, and the City leased to a private operation?

Mr. Gianotti: I think, if the Court please,—

Judge Martin: The State of Tennessee—

Mr. Gianotti: (Continuing) That is primarily the whole function of that particular type operation.

But here the primary function of the lease is—but here the primary function of the lease with Dobbs Houses is to make money for the City of Memphis. And just because it is owned—, in other words, you would say or cannot say—

Judge Martin: What? I can't follow you on it. So that the City of Louisville made money out of leasing this property to the opera concern. Local citizens not only organized it—?

Mr. Gianotti: But ordinarily I don't know of recreational facilities carried on for the public making money, Your [fol. 139] Honor. If it is, I am not informed whether the City of Memphis—that they made any money out of the park system or recreational facility operated by the municipality.

Judge Martin: They may not make a net profit, but they make money, Brother Gianotti, I would think.

Mr. Gianotti: Well, they collect money. Let's put it that way, Your Honor, if I may. They collect it. But I don't think they necessarily make anything there.

Judge Martin: Didn't say they made money—

Mr. Gianotti: Yes, sir.

Judge Martin: I said they made money out of leases.

Mr. Gianotti: Yes, sir.

Judge Martin: I didn't mean profits. They leased for a consideration.

Mr. Gianotti: Yes, sir.

Judge Martin: I didn't quite personally follow that argument down on that basis.

But, now, on your abstention argument, could we get back to that, and do you want to reply about that?

Mr. Gianotti: No, I think I have covered pretty much [fol. 140] the main point on that, if Your Honor please, whether this is a matter this Court should abstain in or have the Supreme Court rule—

Judge Martin: I threw out to opposing counsel the suggestion that we accept it either way. Whether we accept it or not I am not deciding.

The history of this abstention doctrine going back to the proposition that to protect the relationship between dual governments, protect the comity and existing integrity of both the laws,—that the integrity of state laws—that the Federal Courts would not hold unconstitutional constitutional provisions of one of its sovereign states in the United States or a statute pursuant thereto until after the state court has been called upon to decide it. And the case of—the Harrison case dealing with the Fourteenth Amendment in light of Brown against Board of Education case,—and we just reasserted that doctrine and applied it to that situation.

Counsel it seems to me just referred to the actions so as to bring out points which show, so to speak,—if you [fol. 141] can show that this case falls within the same purview, regardless of the refinements, so this is immaterial,—that we would have to abstain as we did in the Evers case.

Mr. Gianotti: Well, as Your Honor well remembers, we relied strongly on the Harrison case, and I think we took the position there that the three-judge court opinion, with one member dissenting, and then the Supreme Court decision with the substantial dissent in that case,—I think there were at least three that dissented,—that they covered all points relating to arguments on both sides that could be made in the dissenting opinion.

And in the three-judge court, now, as you remember, the three-judge court just simply took the position that since the members of this Court felt that it was just impossible for the State Supreme Court of Virginia to do anything other than hold these particular statutes—there were two or three of them—unconstitutional,—so therefore, as to those two or three statutes, we refuse to abstain. As to two of those I think they did abstain.

[fol. 142] Now, the Supreme Court just comes along and says it is not for the three-judge court to say what they think the Supreme Court of Virginia might do or not do. It is up to the Supreme Court.

Now, you can attempt to make all the distinctions you want to. Counsel has made reference to some of them. But after I have read the Harrison case and read the decision of the three-judge court, and read the dissenting opinion of the three-judge court, and read the dissenting opinion of the Supreme Court members who dissented, I think, may it please Your Honors, there is no need for further distinctions or apparent distinction to be made. I think they have covered the field.

Now, here we have a statute that says that a man has a right to do business. Now, I think he has the right to have that passed on,—and whether he is lessor or interested in a declaratory sense in knowing what the law is, because it could very well be, while we are not concerned with leases in all cases with the dollar sign, certainly I think litigants

and people who engage in contracts certainly ought to have [fol. 143] some idea what they are getting into at the time they sign a contract, or they should not take all that risk and chance that they might be involved in a situation of this kind.

So I do say that the City of Memphis and also Dobbs Houses is entitled to have this statute passed on to see exactly what it means in this case, because they certainly haven't passed on a case similar to this.

Judge Martin: Does counsel for plaintiff desire a chance to reply to that particular response of his?

FURTHER ARGUMENT BY MRS. MOTLEY

Mrs. Motley: I would like to just bring to your attention paragraph 3 of the lease. Of course, it is in evidence as my proof, which of course the Court will remember. But with respect to the argument just made, this profit making pattern, the Dobbs House only used it that profit could be made, and it is not necessary to have a restaurant,—paragraph 3 says this:

> "Lessee agrees to conduct a first-class cafe and to sell only such articles and wares as are sanitary, wholesome and clean and of the highest character, and agrees not to charge prices higher than those prevailing in the City of Memphis for the same articles. All—"

[fol. 144] Now, the reason for that I think is clear, that the City would require them to operate this restaurant as a high-class restaurant charging no more than restaurants in the city because the City feels it is necessary for air travel to have eating facilities.

In addition, the lease goes on to point out that this restaurant was serving airlines, passengers travelling on airlines, which again indicates the importance of having a restaurant at the airport. And I don't think there is any airport of any size that doesn't have a restaurant or lunch counter of some kind. And that is because obviously when you go to the airport you may have to wait several hours before the plane could take off, and if there are no eating facilities the passengers are certainly terribly in-

convenienced. And the whole system might break down while trying to transport people back to the city to get food. So I think a public restaurant is necessary to the operation of an airport, certainly an airport of this size.

Judge Martin: Do counsel feel on both sides they have had adequate time to present their respective contentions? [fol. 145] Mr. Heiskell: Yes, sir.

Mrs. Motley: Yes, sir.

Judge Martin: It is an important case and we want to afford that opportunity.

That being the situation, then, the Court will take the case under advisement and make as early a disposition as we think is consistent with what we think is our duty.

(Adjournment)

[fol. 146] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 147]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

Civil Action No. 3934

JESSE TURNER, Plaintiff,

vs.

CITY OF MEMPHIS, DOBBS HOUSES, INC., and W. S. HAVERFIELD, Defendants.

PER CURIAM OPINION—January 23, 1961

Before Martin, Circuit Judge, Boyd and Miller, District Judges.

Per Curiam. This is a suit by the plaintiff, who is a Negro residing in Memphis, Tennessee, on behalf of himself and others similarly situated, asking injunctive relief

against the defendants, City of Memphis, Dobbs Houses, Inc., and the Manager of the latter concern's restaurant in the Memphis Municipal Airport.

[fol. 148] The plaintiff seeks under Title 42, U.S.C.A., Sections 1981 and 1983, to secure certain rights, privileges and immunities guaranteed by the Constitution and laws of the United States. More particularly, the plaintiff is seeking to permanently enjoin the defendants from continuing to operate the eating and rest room facilities located in the airport aforesaid on a racially segregated basis.

Plaintiff claims that he was denied service in the main dining room of the Dobbs Houses Restaurant at the airport because of his race and color, pursuant to the policy, practice, custom and usage of the defendants.

The defendants contend that there are certain statutes and regulations of the State of Tennessee and ordinances of the City of Memphis which require that separate facilities for the Negro and White races be maintained at the Memphis Municipal Airport. In this connection, they contend that this Court should apply the principle of abstention, thereby giving the Courts of Tennessee an opportunity to declare the rights of the plaintiff thereunder.

In Harrison v. NAACP, 360 U.S. 167 the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated [fol. 149] on page 176: "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts, Matthews v. Rodgers, 284 U.S. 521, 525, as their contribution . . . in furthering the harmonious relation between state and federal authority . . .' Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enact-

ments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise: it serves the policy of comity inherent in the doctrine of abstention; [fol. 150] and it spares the federal courts of unnecessary constitutional adjudication."

Thus, in the light of the Harrison case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein.

John D. Martin, Circuit Judge.
Marion S. Boyd, William E. Miller, District Judges.

A True Copy.

Attest: V. Lloyd Johnson, Clerk, By P. G. McClure, D.C.

[fol. 151]

IN THE UNITED STATES DISTRICT COURT

WESTERN DIVISION OF TENNESSEE

WESTERN DISTRICT

Civil Action No. 3934

JESSE TURNER, Plaintiff,

vs.

CITY OF MEMPHIS, et al., Defendants.

ORDER HOLDING CAUSE IN ABEYANCE PENDING STATE COURT ACTION—February 10, 1961

This Cause, came on to be heard on the 9th day of November, 1960, upon the pleadings, testimonies, briefs and

arguments of the parties; and it appearing to the Court for the reason set forth in opinion heretofore filed that said Cause should be held in abeyance pending the Declaratory Judgment suit to be brought by plaintiffs in the Tennessee Courts seeking an interpretation of the State statutes under consideration;

It Is, Therefore, Ordered, Adjudged and Decreed, that said Cause be and the same is hereby held in abeyance pending the filing of such suit and an interpretation of the State statutes involved herein.

John D. Martin, U. S. Circuit Judge.
Marion S. Boyd, William E. Miller, District Judges.

Approved:

R. B. Sugarmon, Jr., Attorney for Plaintiff.

F. B. Gianotti, Jr., (Signature Illegible, for Dobbs Houses, Inc.), Attorneys for Defendants.

[fol. 152] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

WESTERN DIVISION OF TENNESSEE

WESTERN DISTRICT

[Title omitted]

NOTICE OF APPEAL—Filed March 1, 1961

I. Notice is hereby given that Jesse Turner, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the order entered in this case on the 10th day of February, 1961, holding this case in abeyance pending a declaratory judgment suit by the plaintiff in the courts of the State of Tennessee seeking an interpretation of the statutes under consideration. This appeal is taken pursuant to Title 28, U.S.C. 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States, and include in said transcript the following:

1. Complaint filed April 1, 1960
2. Answer of City of Memphis filed April 21, 1960
3. Answer of W. S. Haverfield filed April 21, 1960
4. Answer of Dobbs Houses, Inc., filed April 21, 1960
5. Notice and Motion for Summary Judgment and Affidavit in Support Thereof filed May 18, 1960
6. Hearing on Motion for Summary Judgment, June 3, 1960
7. Motion for Summary Judgment filed June 6, 1960
8. Letter of Circuit Judge McAllister of June 9, 1960 appointing Three Judge Court
9. Order of June 9, 1960, allowing Dobbs Houses to amend answer
10. Hearing on Motion for Summary Judgment on June 27, 1960
11. Order setting hearing before Three Judge Court for November 9, 1960
12. Motions to Amend Answer of Dobbs Houses and City of Memphis filed November 2, 1960
13. Order Allowing Dobbs Houses and City to amend answer of November 9, 1960

[fol. 153]

14. Transcript of Testimony before Three Judge Court on November 9, 1960
15. Per Curiam Opinion of Three Judge Court of January 23, 1961
16. Order of Court entered on February 10, 1961, holding case in abeyance pending State Court Declaratory Judgment Action
17. This Notice of Appeal

III. The following question is presented by this appeal:

> Whether the three-judge court below, in a case involving segregation of Negroes by the lessee of a municipally-owned airport restaurant, erred in refusing to issue a permanent injunction and in requiring institution of a declaratory judgment action by plaintiff in the state courts for interpretation of statutes and regulations pleaded by defendants and in postponing exercise of its jurisdiction pending disposition of such court action.

R. B. Sugarmon, Jr., 588 Vance Avenue, Memphis, Tennessee; Constance Baker Motley, 10 Columbus Circle, New York 19, New York; Thurgood Marshall, 10 Columbus Circle, New York 19, New York, Attorneys for Plaintiff.

[fol. 155] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 156]

SUPREME COURT OF THE UNITED STATES

Appeal From the United States District Court for the Western District of Tennessee

ORDER POSTPONING JURISDICTION—October 9, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and the case is transferred to the summary calendar.

October 9, 1961

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 1 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted]84

JESSE TURNER,

Appellant,

—v.—

CITY OF MEMPHIS, a Municipal Corporation Chartered Under the Laws of the State of Tennessee and DOBBS HOUSES, INC., a Corporation Organized and Existing Under the Laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc., Restaurant in Memphis Municipal Airport,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

JURISDICTIONAL STATEMENT

R. B. SUGARMON, JR.
588 Vance Avenue
Memphis, Tennessee

CONSTANCE BAKER MOTLEY
10 Columbus Circle
New York 19, N. Y.

THURGOOD MARSHALL
10 Columbus Circle
New York 19, N. Y.

Attorneys for Appellant

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Statutes Involved 4

Question Presented 7

Statement 7

The Questions Are Substantial 10

The Court below abused its discretion in denying injunctive relief 10

The Court below abused its discretion in applying the doctrine of abstention to this case 11

Simultaneous Appeal Taken to Court of Appeals 13

APPENDIX A:

District Court's Per Curiam Opinion A1-A3

District Court's Order A4-A5

APPENDIX B:

Memphis Municipal Code, 1949, Vol. 1, §§151.26, 151.27, 151.40 ..... B1

Memphis Municipal Code, 1949, Vol. 2, §§3044.29, 3044.29(d) B2-B3

Table of Cases

PAGE

Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958) 10
Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341 (1951) 11, 12

Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd 352 U.S. 903 13
Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) 12
Bryan v. Austin, 354 U.S. 933 (1957), 148 F. Supp. 563 (E.D. S.C. 1957) 3
Burford v. Sun Oil Co., 319 U.S. 315 (1943) 11, 12
Burton v. Wilmington Parking Authority, No. 164, Oct. Term 1960, decided April 17, 1961, —— U.S. —— 10, 12
Bush v. Orleans Parish School Board, 138 F. Supp. 336 (E.D. La. 1956), mandamus denied, 351 U.S. 948 (1956) 14

Chicago v. Atchison, Topeka & Santa Fe Ry. Co., 357 U.S. 77 (1958) 11
City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957) 10, 11
City of Meridian v. Southern Bell Telephone, 358 U.S. 639 (1959) 11 12
Clay v. Sun Insurance Co., 363 U.S. 207 (1960) 11, 12
Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (6th Cir. 1956), cert. denied 350 U.S. 1006 10
Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960) 10
County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) 11

PAGE

Department of Conservation and Development v. Tate, 231 F.2d 615 (4th Cir. 1956) 10
Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied Casey v. Plummer, 353 U.S. 924 10

Ex parte Poresky, 290 U.S. 30 (1933) 14

Harrison v. N.A.A.C.P., 360 U.S. 167 (1959), 159 F. Supp. 503 (E.D. Va. 1958) 3, 4, 9, 11, 12
Henry v. Greenville Airport Commission, 284 F.2d 631 (4th Cir. 1960) 10

Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W.Va. 1948) 10
Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959) 11, 12

Oklahoma Gas and Electric Co. v. Oklahoma Packing Company, 292 U.S. 386 (1934) 15

Martin v. Creasy, 360 U.S. 219 (1959) 11
Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, vacating and remanding 202 F.2d 275 (6th Cir. 1953) 10, 12, 14

N.A.A.C.P. v. Bennett, 360 U.S. 471 (1959) 3, 4

Orleans Parish School Board v. Bush, 268 F.2d 78 (5th Cir. 1959) 13

Phillips v. United States, 312 U.S. 246 (1941) 14
Propper v. Clark, 337 U.S. 472 (1949) 11
Public Utilities Commission v. United States, 355 U.S. 534 (1958) 11

PAGE

Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941) 11, 12

Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944) 11

Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 14

The Vessel Tungus v. Skovgaard, 358 U.S. 588 (1959) 11

Union Tool Co. v. Wilson, 259 U.S. 107 (1922) 10

STATUTES

Title 28, United States Code, §1253 3

Title 28, United States Code, §1343(3) 2, 8, 13

Tennessee Code Ann., Vol. 9, §53-2120 ..... 4, 8, 12

Tennessee Code Ann., Vol. 9, §53-2121 ..... 4, 12

Tennessee Code Ann., Vol. 11, §62-710 ..... 6, 9, 12

REGULATIONS

Department of Conservation of the State of Tennessee, Division of Hotel and Restaurant Inspection, Regulation No. R-18(1). Approved June 18, 1952 ..... 4, 8

ORDINANCES

Memphis Municipal Code, 1949, Vol. 1, §§151.26, 151.27, 151.40 7

Memphis Municipal Code, 1949, Vol. 2, §§3044.29, 3044.29(d) 6

IN THE

Supreme Court of the United States

October Term, 1960

No. .....

JESSE TURNER,

Appellant,

—v.—

CITY OF MEMPHIS, a Municipal Corporation Chartered Under the Laws of the State of Tennessee and DOBBS HOUSES, INC., a Corporation Organized and Existing Under the Laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc., Restaurant in Memphis Municipal Airport,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court, Western District of Tennessee, Western Division, which denied, after notice and hearing, appellant's prayer for injunction enjoining appellees from segregating Negroes in the Dobbs Houses Restaurant in the Memphis Municipal Airport. Appellant submits this statement demonstrating the jurisdiction of this Court upon this appeal and further demonstrating that the question presented is a substantial federal question.

Opinions Below

The per curiam opinion of the three-judge District Court, consisting of Sixth Circuit Judge John D. Martin, District Judge Marion S. Boyd, Western District Tennessee, Western Division, and District Judge William E. Miller, Middle District Tennessee, Nashville Division, is not yet reported and is, therefore, attached hereto as Appendix A.

Jurisdiction

This suit was brought in the United States District Court, Western District Tennessee, Western Division, on April 1, 1960 by appellant Turner on behalf of himself and other Negroes similarly situated. That Court's jurisdiction was invoked pursuant to provisions of Title 28, United States Code, §1343(3). The relief sought was an injunction enjoining the City of Memphis and its lessee, Dobbs Houses, from pursuing a policy, practice, custom and usage of segregating appellant, and other members of his class, in the use of certain airport facilities and with respect to service in the Dobbs Houses Restaurant located therein. Appellees' answers admitted the segregation complained of and the leasing of the restaurant facility to Dobbs Houses but alleged that certain state statutes, a state agency regulation, and several city ordinances either authorized or required segregation in the airport's restaurant and rest room facilities. Appellees alleged that unless and until these state statutes, regulation and ordinances were declared unconstitutional, segregation would be required by them and prayed for the convening of a statutory three-judge court to hear and determine this cause. However, appellees also claimed that the restaurant operated by Dobbs Houses, although leased from the city, is operated "... as a private facility, to which the 14th Amendment

does not apply, and the operator has a legal right to enforce any rules and policies which it deems advisable in regard to the seating of patrons, including the right to seat and serve patrons in separate area because of race or color." The District Court agreed with appellees that this was a case for a three-judge court which was subsequently convened. The per curiam opinion of that court —staying this cause pending suit for declaratory judgment by appellant in the state courts for construction of the statutes, regulation and ordinances involved—was rendered January 23, 1961. The order to this effect was entered on February 10, 1961. Notice of appeal was filed in the District Court on March 1, 1961. Jurisdiction of this Court to review this cause by direct appeal is conferred by Title 28, United States Code, §1253 which provides as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal: *NAACP* v. *Bennett*, 360 U.S. 471 (1959); *Harrison* v. *NAACP*, 360 U.S. 167 (1959) and *Bryan* v. *Austin*, 354 U.S. 933 (1957). In the case of *Bryan* v. *Austin*, *supra*, the District Court rendered a decision, similar to the decision below, invoking the doctrine of equitable abstention in a case involving the constitutionality of a South Carolina statute denying public employment to NAACP members (E.D. S.C. 1957, 148 F. Supp. 563). However, on direct appeal to this Court, this Court vacated the order below on the ground that the case

had become moot, the statute sought to be enjoined having been repealed after the decision of the District Court in that case. In the case of *NAACP* v. *Bennett*, in which the constitutionality of an Arkansas statute affecting the NAACP was attacked, the District Court automatically remanded the case to the state court for construction of the statute (unreported). Upon appeal to this Court, the judgment of the District Court was vacated and the case remanded for consideration in the light of *Harrison* v. *NAACP*, *supra*. In the *Harrison* case, a direct appeal was taken to this Court from a judgment holding three Virginia statutes unconstitutional (E.D. Va. 1958, 159 F.Supp. 503). Upon appeal to this Court, the judgment was vacated and the case remanded with instruction to retain jurisdiction but to afford appellees a reasonable opportunity to bring appropriate proceedings in Virginia courts for construction of the statutes held unconstitutional. The exercise of jurisdiction by this Court in these three cases sustains the exercise of jurisdiction by this Court in this case.

Statutes Involved

Appellant did not rely upon or seek to enjoin the enforcement of any state statute, state regulation or city ordinance in his complaint.

In the answers filed, appellees relied upon a state regulation, promulgated by the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee, Regulation No. R-18(1), which provides:

> Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons

> of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952.)

This regulation was adopted pursuant to the provisions of §53-2121 of the Tennessee Code Ann., Vol. 9, which provides as follows:

> Rules and regulations authorized—Arbitration of inconsistencies.—The division is hereby authorized to make such rules and regulations, including a code of sanitation, as may be necessary to carry out the purposes of §§53-2101–53-2121 and to protect the public health and safety. In any instances where there is an inconsistency as between the requirements of the division and those of a local county, or city, health officer, such inconsistency is to be arbitrated by a three (3) man board consisting of the director, the local health officer concerned, and a third member to be chosen by these two.

Appellees claimed that violation of the regulation is declared to be a misdemeanor, punishable by fine, by §53-2120, Tennessee Code Ann., Vol. 9, which provides as follows:

> Violation of regulations or provisions penalized.—Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant, who shall fail or refuse to comply with any of the provisions of §§53-2101–53-2121 or with the rules and regulations promulgated by the division, shall be deemed guilty of a misdemeanor, and shall be fined not less than ten dollars ($10.00) nor more than

one hundred dollars ($100) for each offense, and each day after sufficient notice has been given shall constitute a separate offense.

By amendment to their answer, appellee Dobbs Houses also relied upon §62-710, Tennessee Code Ann., Vol. 11, which provides as follows:

> Right of owners to exclude persons from places of public accommodation.—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family.

The answer of appellee, City of Memphis, relied upon a city ordinance requiring segregation in rest room facilities.[1] As the basis for enforcing this ordinance, the City also cited ordinances extending the police power of the

[1] Memphis Municipal Code, 1949, Vol. 2, §§3044-29 and 3044-29(d).

City to the airport,[2] prohibiting disorderly conduct at the airport,[3] and providing for the removal of any person using the airport in violation of the law relating thereto.[4] These ordinances are set forth in Appendix B. Appellant is informed that the rest rooms in the Memphis Municipal Airport are no longer segregated. The only facility still segregated is the Dobbs Houses Restaurant.

Question Presented

Whether the three-judge court below, in a case involving segregation of Negroes by the lessee of a municipally-owned airport restaurant, abused its discretion in refusing to issue a permanent injunction enjoining such segregation and in postponing exercise of its jurisdiction pending suit for declaratory judgment by appellant in the state courts for interpretation of statutes, regulation and ordinances pleaded by appellees.

Statement

The facts in this case are not disputed. The appellant, Jesse Turner, is an adult Negro citizen of the United States and of the State of Tennessee, residing in Memphis, Tennessee. He is the executive vice-president and cashier of the Tri-State Bank in Memphis. He is also an elected official, holding the position of member of the Executive Committee of the Shelby County Democratic Party. In connection with his work, he uses the Memphis Airport approximately three or four times a year. On April 28, 1959, he and two business associates went into the main dining room of the Dobbs Houses Restaurant in the airport. Upon entering the restaurant he was stopped by a hostess and

---

[2] *Ibid.*, Vol. 1, §151.26.
[3] *Ibid.*, Vol. 1, §151.27.
[4] *Ibid.*, Vol. 1, §151.40.

directed by her to a small room reserved for Negroes adjacent to the main dining room. Mr. Turner requested that he be allowed to see the manager. Appellant was addressed by appellee Haverfield who identified himself as the manager and said that Negroes are not served in the main dining room but in a separate area reserved for them. Appellant declined the invitation to be served in the small room reserved for Negroes. Thereafter, on October 29, 1959, upon returning from Atlanta as a passenger on Eastern Air Lines, appellant again requested service in the main dining room of the Dobbs Houses Restaurant. Again he was informed by the manager, Mr. Haverfield, that Negroes could not be served in the main dining room. When he asked why he could not be served in the main eating facility, he was told by the manager that the state law prevented it.

This suit was commenced by appellant on April 1, 1960 to restrain the enforcement of this segregation. Jurisdiction was invoked pursuant to the provisions of Title 28, United States Code, §1343(3). The complaint did not rely upon or seek to enjoin the enforcement of any state statute, state regulation or city ordinance. On April 21, 1960, all appellees filed answers in which they admitted all the segregation complained of and the leasing of the restaurant to Dobbs Houses but prayed the convening of a three-judge court on the ground that there had been promulgated a valid regulation of the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee, Regulation No. R-81(1), and claimed that a violation of the regulation would constitute a misdemeanor punishable by fine under §53-2120, Tennessee Code Annotated. Appellees alleged that, unless and until the regulation shall have been declared unconstitutional, their duty is to object to desegregation of the races in the airport restaurant, since such desegregation would be a violation

of the laws of the State of Tennessee and a violation of Paragraph 20 of the lease between the City and Dobbs Houses requiring the latter to abide by all state laws.

Appellees also claimed that operation of the restaurant is a private facility to which the 14th Amendment does not apply, and that Dobbs Houses has the legal right to enforce any rules and policies which it seems desirable in regard to seating patrons, including segregation on account of race. Appellee Dobbs Houses also relied upon §62-710 of the Tennessee Code granting owners the right to exclude persons from certain places of public accommodation.

There is no question that the purpose of the lease of the restaurant facility to Dobbs Houses was to provide food service for airline passengers and the members of the public using the airport.

On May 18, 1960, appellant filed a motion for summary judgment which came on for hearing on June 3, 1960. The single-judge District Court hearing the motion ruled that it could not act on the motion because the case was one for a three-judge court. Thereafter, on June 6, 1960 appellant renewed his motion for summary judgment. On June 9, 1960, an order was entered by Chief Judge McAllister of the Sixth Circuit designating the three members of the court below. The case came to trial before that court on November 9, 1960. Subsequently, on January 23, 1961 a per curiam opinion was rendered in which the court, relying upon *Harrison* v. *NAACP*, 360 U.S. 167 (1959), ruled that "in the light of the Harrison case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein."

The Questions Are Substantial

The Court below abused its discretion in denying injunctive relief.

The right of Negro residents to service, without discrimination against them because of race, in publicly owned facilities leased to private persons for operation for the benefit of the public is a right guaranteed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. *Burton* v. *Wilmington Parking Authority*, No. 164, Oct. Term 1960, decided April 17, 1961, —— U.S. ——; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971, vacating and remanding 202 F.2d 275 (6th Cir. 1953). This right has been upheld by the Courts of Appeal and the District Courts. *Aaron* v. *Cooper*, 261 F.2d 97 (8th Cir. 1958); *City of Greensboro* v. *Simkins*, 246 F.2d 425 (4th Cir. 1957); *Derrington* v. *Plummer*, 240 F.2d 922 (5th Cir. 1956); cert. denied *Casey* v. *Plummer*, 353 U.S. 924; *Department of Conservation* v. *Tate*, 231 F.2d 615 (4th Cir. 1956); *Coke* v. *City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W.Va. 1948).

There was no dispute as to the facts in this case. All appellees admitted that Negroes are segregated in the Dobbs Houses Restaurant. The leasing was also admitted. The lease specifically requires Dobbs Houses to serve the public food at prices prevailing in Memphis and to make soft drinks and other items available to the public.

Failure to apply well settled principles of law to undisputed facts is an abuse of discretion in law. *Union Tool Co.* v. *Wilson*, 259 U.S. 107 (1922); *Henry* v. *Greenville Airport Commission*, 284 F. 2d 631 (4th Cir. 1960); *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853 (6th Cir.

1956), cert. den. 350 U.S. 1006. Consequently, the court below abused its discretion in failing to issue a permanent injunction as prayed.

The Court below abused its discretion in applying the doctrine of abstention to this case.

The doctrine of abstention which was invoked by the court below has been held by this Court to be a "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). See also *Propper* v. *Clark*, 337 U.S. 472 (1949); *Public Utilities Commission* v. *United States*, 355 U.S. 534 (1958); *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U.S. 77 (1958); *The Vessel Tungus* v. *Skovgaard*, 358 U.S. 588 (1959); *NAACP* v. *Bennett*, 360 U.S. 471 (1959). It is a doctrine which involves an exercise of discretion in "exceptional circumstances" which certainly are not present in the instant case, *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, at 188-189, but which were present and identified in those cases to which the doctrine has been applied. *Railroad Commission of Texas* v. *Pullman*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944); *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U.S. 341 (1951); *City of Meridian* v. *Southern Bell Telephone*, 358 U.S. 639 (1959); *Louisiana Power and Light Co.* v. *Thibodaux*, 360 U.S. 25 (1959); *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959); *Martin* v. *Creasy*, 360 U.S. 219 (1959); *Clay* v. *Sun Insurance Co.*, 363 U.S. 207 (1960).

In the *Pullman* case this Court made clear that the doctrine is applicable to those cases where "constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy" (at 498).

pointing out that, "Federal courts should avoid a tentative answer which may be displaced by a state adjudication" (at 500). This test was employed in the *Spector* case, *supra*, the *Alabama Public Service Commission* case, *supra*, in *City of Meridian* v. *Southern Bell Telephone*, *supra*, *Harrison* v. *N.A.A.C.P.*, *supra*, and *Clay* v. *Sun Insurance Co.*, *supra*, when the doctrine was applied.

Here it is plain that a definitive ruling on the state law relied on by Dobbs Houses (62-710 and 53-2120) and the statute (53-2121) and regulation (No. R-18(1)) relied on by all appellees would not terminate the controversy as to whether the lessee here is subject to the Fourteenth Amendment.

In the *Pullman* case this Court also ruled that the abstention doctrine should be applied by District Courts where its invocation would avoid "needless friction with state policies" (at 500). This criterion was used to sustain application of the doctrine in *Burford* v. *Sun Oil Co.*, *supra*, where only domestic policy issues were involved, in *Alabama Public Service Commission* v. *Southern Ry.*, *supra*, involving predominantly local factors, and in *Louisiana Light and Power Co.* v. *Thibodaux*, *supra*, where the issue touched upon the relationship of City and State.

Again, it is too plain to require argument that this case does not fall into this latter category. The state policy of segregation in a public airport restaurant is constitutionally void, not only as to the state, but as to its lessee, in this instance. *Burton* v. *Wilmington Parking Authority*, *supra*; *Muir* v. *Louisville Park Theatrical Ass'n*, *supra*; *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954). The issuance of an injunction here would have upheld the Federal constitutional policy so often reaffirmed by this Court.

As the District Court said in *Browder* v. *Gayle* (M.D. Ala. 1956), 142 F. Supp. 707, aff'd 352 U.S. 903, "The short answer is that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts" (at 713). And, "No cause for abstention by the federal court is shown merely because a suit is brought against state officials whose conduct may be affected by untested state legislation. It is only when the federal court is called on to interpret such state statutes or rule on its constitutionality that the rule applies." *Orleans Parish School Board* v. *Bush*, 268 F.2d 78, 80 (5th Cir. 1959).

Appellant, therefore, believes that the questions presented are substantial and that they are of public importance.

Simultaneous Appeal Taken to Court of Appeals

Appellant invoked the jurisdiction of the District Court pursuant to Title 28, United States Code, 1343(3) alleging that appellees, acting under color of the laws of the State of Tennessee and ordinances of the City of Memphis, were pursuing a policy, practice, custom and usage of segregating Negroes and white persons in the Dobbs Houses Restaurant in the Airport. Appellant did not rely upon or seek to have the District Court enjoin the enforcement of any specific state statute or regulation or city ordinance. Appellant's theory was that the City as well as its lessee of municipal property, which is to be operated for the benefit of the public, are clearly subject to the prohibitions of the Fourteenth Amendment—state statutes, regulations, or city ordinances to the contrary, notwithstanding, same being clearly unconstitutional in the light of prior recent decisions of this

Court. *Muir* v. *Louisville Park Theatrical Ass'n*, *supra*. Consequently, appellant conceived that an injunction could be entered by the District Court enjoining Dobbs Houses and the City of Memphis from segregating Negroes without bringing about any sudden doom of state-wide policy about which there might be some genuine questions as to constitutionality. *Ex parte Poresky*, 290 U.S. 30 (1933); *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336 (E.D. La. 1956), mandamus denied, 351 U.S. 948 (1956).

Subsequently, a three-judge court was convened and the case came on for trial after due notice. Thereafter, the court applied the abstention doctrine. Since appellant believes that there is some doubt as to whether this case is properly one for a three-judge court, appellant has taken a simultaneous appeal to the Court of Appeals for the Sixth Circuit as a precaution against the possibility that this Court might find that a three-judge court was improperly convened and the appeal should have been taken to the Court of Appeals from the District Court's application of the abstention doctrine. If this Court were to so rule, the time within which to appeal to the Court of Appeals would have expired. Appellant is preparing to docket an appeal in that Court by May [illegible], 1961 (the time having been duly extended by order of Judge Boyd). Appellant will then move the Sixth Circuit for an order staying all proceedings in that appeal pending this Court's disposition of the instant appeal. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 380-381. See also, *Phillips* v. *United States*, 312 U.S. 346,

355 (1941) and *Oklahoma Gas and Electric Co.* v. *Oklahoma Packing Company*, 292 U.S. 386 (1934).

Respectfully submitted.

R. B. Sugarmon, Jr.
588 Vance Avenue
Memphis, Tennessee

Constance Baker Motley
10 Columbus Circle
New York 19, N. Y.

Thurgood Marshall
10 Columbus Circle
New York 19, N. Y.

Attorneys for Appellan

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

Civil Action No. 3934

JESSE TURNER,

Plaintiff,

—VS.—

CITY OF MEMPHIS, DOBBS HOUSES, INC., and W. S. HAVERFIELD,

Defendants.

Before:

MARTIN, *Circuit Judge,*
BOYD and MILLER, *District Judges.*

PER CURIAM. This is a suit by the plaintiff, who is a Negro residing in Memphis, Tennessee, on behalf of himself and others similarly situated, asking injunctive relief against the defendants, City of Memphis, Dobbs Houses, Inc., and the Manager of the latter concern's restaurant in the Memphis Municipal Airport.

The plaintiff seeks under Title 42, U.S.C.A., Sections 1981 and 1983, to secure certain rights, privileges and immunities guaranteed by the Constitution and laws of the United States. More particularly, the plaintiff is seeking to permanently enjoin the defendants from continuing to operate the eating and rest room facilities located in the airport aforesaid on a racially segregated basis.

Plaintiff claims that he was denied service in the main dining room of the Dobbs Houses Restaurant at the airport because of his race and color, pursuant to the policy, practice, custom and usage of the defendants.

The defendants contend that there are certain statutes and regulations of the State of Tennessee and ordinances of the City of Memphis which require that separate facilities for the Negro and White races be maintained at the Memphis Municipal Airport. In this connection, they contend that this Court should apply the principle of abstention, thereby giving the Courts of Tennessee an opportunity to declare the rights of the plaintiff thereunder.

In Harrison v. NAACP, 360 U.S. 167 the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated on page 176: "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validiy administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521, 525, as their contribution . . . in furthering the harmonious relation between state and federal authority . . . ' Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent

in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

Thus, in the light of the Harrison case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein.

s/ JOHN D. MARTIN
Circuit Judge

s/ MARION S. BOYD
District Judge

s/ WILLIAM G. MILLER
District Judge

Order

IN THE UNITED STATES DISTRICT COURT

WESTERN DIVISION OF TENNESSEE

WESTERN DISTRICT

Civil Action No. 3934

JESSE TURNER,

Plaintiff.

—VS.—

CITY OF MEMPHIS, *et al.*,

Defendants.

This Cause, came on to be heard on the 9th day of November, 1960, upon the pleadings, testimonies, briefs and arguments of the parties; and it appearing to the Court for the reason set forth in opinion heretofore filed that said Cause should be held in abeyance pending the Declaratory Judgment suit to be brought by Plaintiffs in the Tennessee Courts seeking an interpretation of the State statutes under consideration.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that said Cause be and the same is hereby held in abeyance

pending the filing of such suit and an interpretation of the State statutes involved herein.

JOHN D. MARTIN
U. S. Circuit Judge

MARION S. BOYD
District Judge

WILLIAM E. MILLER
District Judge

APPROVED:

R. B. SUGARMON
Attorney for Plaintiff

F. B. GIANOTTI, JR.
FRANK
Attorneys for Defendants.

APPENDIX B

Memphis Municipal Code, 1949, Vol. 1.

Section 151.26. Police Powers. All the powers of the police officers of the city, derived from whatever source, are hereby extended to the area embraced within the Memphis municipal airport as the same now exists, or as the same may be hereafter established.

Section 151.27. Disorderly, etc., conduct. No person shall commit any disorderly, obscene, indecent or unlawful act, or commit any nuisance on the airport.

Section 151.40. Violation of regulations; misdemeanors. Any person operating or handling any vehicle, equipment, or apparatus or using the airport or any of its facilities in violation of this chapter, or refusing to comply herewith, may be removed from the airport, and deprived of and refused the further use of the airport and its facilities for such length of time as may be determined by the airport manager.

Any offense declared to be a misdemeanor by ordinance of the city shall be a misdemeanor if committed on the Memphis municipal airport, and shall be punishable as provided by the ordinances of the city pertaining to such violation.

Memphis Municipal Code, 1949, Vol. 2.

Section 3044.29. General requirements for water closets, urinals and lavatories in all buildings other than one- and two-family dwellings and multi-family dwelling units. In all buildings other than one- and two-family dwellings and multi-family dwelling units, there shall be one or more water closets in conformity with

the general requirements of this section, together with the required number of urinals and lavatories according to the occupancy, as provided in the following sections. The lavatories shall be in an ante-room or compartment when more than one commode or urinal is required, or provided. The space provided for each fixture and other details shall be as required in Section 3044.27.

• • • • •

(d) *Separate facilities required for white and black races and for both sexes.* Where buildings are used by both white and black races, separate facilities shall be provided for each race, and separate facilities shall be provided for both sexes of each race, where both men and women use any such building.

(e) *Proper signs to be affixed.* Proper signs shall be affixed on water closets indicating those provided for each race and for each of the sexes, in all buildings or places where such separate facilities are required.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 31 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. [redacted] 84

JESSE TURNER,
Appellant,

vs.

CITY OF MEMPHIS, a Municipal Corporation Chartered under the Laws of the State of Tennessee, and DOBBS HOUSES, INC., a Corporation Organized and Existing under the Laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc., Restaurant in Memphis Municipal Airport,
Appellees.

MOTION TO DISMISS APPEAL.

EDWARD P. A. SMITH,
Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Appellees, Dobbs Houses, Inc., and W. S. Haverfield.

Of Counsel:

JOHN M. HEISKELL,
WILLIAM V. ALEXANDER, JR.,
MONTEDONICO, BOONE, GILLILAND,
HEISKELL & LOCH,
Commerce Title Building,
Memphis, Tennessee.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

JESSE TURNER,
Appellant,

vs.

CITY OF MEMPHIS, a Municipal Corporation Chartered under the Laws of the State of Tennessee, and DOBBS HOUSES, INC., a Corporation Organized and Existing under the Laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc., Restaurant in Memphis Municipal Airport,
Appellees.

MOTION TO DISMISS APPEAL.

Appellees, Dobbs Houses, Inc., and W. A. Haverfield, Manager of the Dobbs Houses, Inc., restaurant in Memphis Municipal Airport, file this Motion to Dismiss pursuant to United States Supreme Court Rule 16, on the ground that this case does not present a substantial federal question at this time.

OPINION BELOW.

The opinion of the three-judge District Court, not having been printed on the date of filing this brief, may be found in Appendix "A" of appellant's brief, and in Appendix "A" of motion to dismiss filed on behalf of the City of Memphis.

JURISDICTION.

Appellees submit to the jurisdiction of this Court.

STATUTES INVOLVED.

As stated in the Jurisdictional Statement filed on behalf of Jesse Turner, appellant, at pages 4, 5, and 6, the appellees did rely on certain statutes and regulations of the State of Tennessee and its governmental agency, Department of Conservation, Division of Hotel and Restaurant Inspection wherein there has been promulgated a valid regulation of said Division and Department designated as Regulation No. R-18(1), which reads as follows:

> "Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises."

Violation of the above quoted regulation is declared to be a misdemeanor punishable by fine by Section 53-2120, Tennessee Code Annotated, which reads as follows:

"Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant who shall fail or refuse to comply with any of the provisions of this Act, or with the rules and regulations promulgated by the Division shall be deemed guilty of a misdemeanor, and shall be fined not less than Ten Dollars nor more than One Hundred Dollars for each offense, and each day after sufficient notice has been given shall constitute a separate offense."

QUESTION PRESENTED.

Whether there was an abuse of discretion by the three-judge court in refusing to enjoin appellees from operating under laws of the State of Tennessee, the constitutionality of which has not been properly challenged by the appellant herein in the courts of Tennessee.

STATEMENT OF FACTS.

Appellees admit the facts as stated by the appellant beginning on page 7 of his brief.

PROPOSITIONS OF LAW.

I. Defendant Dobbs Houses, Inc., is precluded by state regulation promulgated pursuant to statute from serving negro and white patrons in a common restaurant facility.

Section 53-2120, Tennessee Code Annotated, Regulation No. R-18(1), Department of Conservation, Division of Hotel & Restaurant Inspection, Third Defense.

II. Defendant Dobbs Houses, Inc., must treat the statute and regulation as constitutional at its peril, until judicially otherwise decreed.

Claybrook v. *State*, 164 Tenn. 440, 443, (1932).
Beaver v. *Hall et al.*, 142 Tenn. 416 (1919).
Hunter v. *State*, 158 Tenn. 63 (1928).

III. Constitutionality of state law being a primary issue, this is a proper case for the application of the principle of abstention so that Tennessee Courts may have a reasonable opportunity to construe the Tennessee Statute and Regulation.

Harrison v. *NAACP*, 360 U.S. 167 (1959).

ARGUMENT.

The case at bar arises to this Supreme Court in opposition to the established principle that the federal courts should avoid passing on questions of the constitutionality of state laws in situations where an authoritative interpretation of state law by state courts may avoid potential constitutional issues. The doctrine of abstention of federal courts was applied by the three-judge court in the action below as follows, in part:

> "In Harrison v. NAACP, 360 U.S. 167, the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated on page 176: 'This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts." Matthews v. Rodgers,

284 U.S. 521, 525, as their contribution * * * in furthering the harmonious relation between state and federal authority . . .' Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary cons. utional adjudication.

"Thus, in the light of the *Harrison* case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein." Also see Appendix "A", Jurisdictional Statement of the appellant, and *Harrison* v. *NAACP*, 360 U.S. 167 (1959) (at pp. 176-177).

In focusing upon a successful and unique federal system of governmental functioning the members of the three-judge court below[1], combined their long years of judicial experience and wisdom to apply the doctrine of abstention

1. Martin, Circuit Judge, and Boyd and Miller, District Judges.

as defined by Mr. Justice Harlan in *Harrison* v. *NAACP*, *supra*. This conclusion was apparently reached with the knowledge that our federal system has proven to be successful in that it permits the distribution of the governmental work load between the federal government and the respective state governments. And with the knowledge that it is unique because it gives these state governments the necessary degree of flexibility needed in order to live and prosper in harmony with one another.

Under the laws of Tennessee a declaratory judgment statute[2] is available to the appellant through which he may assert his grievance. The natural result of this procedure would permit the State of Tennessee an opportunity to determine the constitutionality of its own laws. This would be a procedure that is in keeping with the dignity that should be afforded any state of our Federal Union, and is, by the same token, consistent with the decisions of the Supreme Court. It is not unreasonable to assume that the State of Tennessee will fulfill its duty in construing these laws in the light of state and federal constitutional requirements. It is submitted that the Supreme Court of Tennessee has no inclination to shirk its duty toward this Supreme Court or its interpretation of the Constitution of the United States. In *Roy* v. *Brittain*, 201 Tenn. 140, 297 S.W.2d 72 (1956) it was held that under the supremacy clause of Article 6 of the Constitution of the United States, the Tennessee Supreme Court was bound by the holding of the United States Supreme Court in the case of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and that the segregation of races in the field of public education under the separate but equal doctrine deprived persons

2 Tenn. Code Ann., Vol. 5, Sec. 23-1101, *et seq.*

so segregated of the equal protection of the laws guaranteed under this amendment.

Upholding the doctrine of abstention in the case at bar would not be construed to mean that the federal courts lose jurisdiction in cases where the state courts have not passed upon the statute under attack, or that the federal court is powerless to take any action until a decision by the state court has been rendered. *NAACP* v. *Patty*, 159 F. Supp. 503 (E.D. Va. 1958). The position of the federal courts is in no way diminished by this procedure.

Mr Justice Harlan said in the *Harrison* case, *supra*:

> "* * * All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. * * *" (at p. 178).

This statement, by that distinguished jurist, exemplifies appellees' position and demonstrates what the Court is asked to consider, and to allow.

CONCLUSION.

It is, therefore, prayed that this appeal be dismissed, or deferred until such time as the courts of Tennessee have been afforded an opportunity to construe, interpret and pass on the validity of the state laws and regulations hereinbefore set forth.

Respectfully submitted,

EDWARD P. A. SMITH,
Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Appellees, Dobbs Houses, Inc., and W. S. Haverfield.

Of Counsel:

JOHN M. HEISKELL,
WILLIAM V. ALEXANDER, JR.,
MONTEDONICO, BOONE, GILLILAND,
HEISKELL & LOCH,
Commerce Title Building,
Memphis, Tennessee.

No. [illegible]

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1960

JESSE TURNER,
Appellant

vs.

CITY OF MEMPHIS, et al,
Appellees.

Appeal from the United States District Court for the Western District of Tennessee, Western Division

---

MOTION TO DISMISS

FRANK B. GIANOTTI, JR.,
146 North Third
Memphis, Tennessee

JAMES M. MANIRE,
146 North Third
Memphis, Tennessee

E. BRADY BARTUSCH,
146 North Third
Memphis, Tennessee
Of Counsel

INDEX

Page

Opinion Below 1

Jurisdiction 1

Statute Involved 1

Question Presented 2

Statement of Facts 2

Argument 2

Conclusion 10

CASES CITED

Harrison v. NAACP, 360 U.S., 167, 79 S. Ct., 1025

Williams v. Dalton, 231 F. 2d, 646 (1956)

STATUTE

Tennessee Code Annotated, Vol. II, Sec. 62-710.

In The

SUPREME COURT OF THE UNITED STATES

JESSE TURNER,
Appellant

vs.

CITY OF MEMPHIS, et al.,
Appellees

MOTION TO DISMISS

The appellees, pursuant to United States Supreme Court Rule 16, file this motion to dismiss on the ground that the appeal does not properly lie to this Honorable Court at this time.

Opinion Below

The Opinion of the District Court has not yet been reported but a true copy thereof appears as Appendix "A" to the Statement as to Jurisdiction filed herein by the appellant.

Jurisdiction

Appellees concede that this Court would acquire jurisdiction in this cause after the statutes involved have been authoritatively construed by the State Courts.

Statute Involved

Section 710, Title 62, Tennessee Code Annotated, which section is set forth on Page 6 of appellant's Jurisdictional Statement.

Question Presented

The question presented is whether the action of the Three Judge District Court was correct in its application of the doctrine of abstention with regard to State statutes which have not been authoritatively construed by the State Courts.

Statement of Facts

The complaint is predicated on the proposition that the plaintiff (appellant) was refused service by the Dobbs Houses Restaurant, Inc., except in a segregated section of restaurant facilities which said corporation operates at the Memphis Municipal Airport in a space under lease from the City of Memphis. The implication of the allegations of said complaint is that the plaintiff at the time of the suit and in the future will be deprived of his civil rights.

It should be pointed out that the restroom facilities at the Memphis Municipal Airport are not now segregated.

Argument

As has been stated above the restroom facilities at the Memphis Municipal Airport are not now segregated, thus the City of Memphis as lessor of the defendant (appellee) Dobbs Houses, Inc., must of necessity rely on the interpretation of the statute set forth in defendant Dobbs Houses amendment to its answer, which is T.C.A. 62-710.

This Court should, under the principle of abstention, extend to the Tennessee Courts the opportunity to say what its views may be with respect to said statutes and in the light of the late decisions of the Supreme Court of the United States.

On June 8, 1959, this Honorable Court decided *Harrison v. NAACP,* 360 U.S. 167, 79 S.Ct. 1025, announcing the

principle of abstention in all of the current segregation litigations. It was a six to three decision. All arguments pro and con for this principle of abstention in the segregation litigation were made by the majority and the minority. Nothing more can be said pro or con as all has been clearly set forth in this decision.

The application of the principle is therefore the firm law and is not in any sense optional, elective or discretionary, but binds all of us.

Tennessee has, of course, a Declaratory Judgment Statute. Tennessee Courts are open to the plaintiff. The plaintiff should be required to file his action in the State Court for an interpretation of the statute in question and in the meantime, this action should be stayed until determination of the state litigation. On appropriate appeal from the State Court this Court can then determine if it is necessary for it to take any further action to fully protect and enforce the plaintiff's constitutional rights. This procedure is in substance the holding of this Court in the Harrison case.

Judge Harlan wrote the majority opinion. Judge Douglas wrote the minority opinion in which Judges Warren and Brennan concurred. The majority opinion states the case and the legal conclusion in the quotations which follow:

> "In this case a three-judge District Court was convened pursuant to 28 U.S.C. Sec. 2281, 28 U.S.C.A. Sec. 2281, to hear federal constitutional challenges against five Virginia statutes. It declared three invalid under the Fourteenth Amendment, and permanently enjoined the appellants from enforcing them against the appellees; the other two statutes it found vague and ambiguous and accordingly retained jurisdiction pending a construction by the state courts. 159

F. Supp. 503. Only the former disposition was appealed. The appeal raises two questions: First, whether in the circumstances of this case the District Court should have abstained from a constitutional adjudication, retaining the cause while the parties, through appropriate proceedings, afforded the Virginia courts an opportunity to construe the three statutes in light of state and federal constitutional requirements. Second, if such an abstention was not called for, whether the District Court's constitutional holdings were correct. Because of our views upon the first question we do not reach the second.

****

"The Attorney General and his codefendants moved to dismiss the action on the ground, among others, that the District Court should not 'exercise its jurisdiction to enjoin the enforcement of state statutes which have not been authoritatively construed by the state courts.' The District Court, recognizing 'the necessity of maintaining the delicate balance between state and federal courts under the concept of separate sovereigns.' stated that 'the constitutionality of state statutes requiring special competence in the interpretation of local law should not be determined by federal courts in advance of a reasonable opportunity afforded the parties to seek an adjudication by the state court,' but considered that relief should be granted where 'the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional ***.' 159 F. Supp. at pages 522, 523. On this basis, the court, one judge dissenting, held Chapters 31, 32 and 35 unconstitutional, and permanently enjoined their enforcement against NAACP and Fund.

Chapters 33 and 36, on the other hand, the Court unanimously found vague and ambiguous. It accordingly retained jurisdiction as to those Chapters, without reaching their constitutionality, allowing the complaining parties a reasonable time within which to obtain a state interpretation.

****

"These constitutional holdings were made in the context of findings that Chapters 31, 32 and 35, as well as Chapters 33 and 36 not presently before us, were passed by the Virginia Legislature 'to nullify as far as possible the effect of the decision of the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (74 S. Ct. 686, 98 L. Ed. 873) * * as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees.' 159 F. Supp. at pages 511, 515. In the view we take of this case we do not reach appellants' objections to these findings.

"According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. In other words, we think that the District Court in dealing with Chapters 31, 32 and 35 should have followed the same course that it did with respect to Chapters 33 and 36.

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal

courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should, at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521, 525, 52 S. Ct. 217, 219, 76 L. Ed. 447, as their 'contribution * * * in furthering the harmonious relation between state and federal authority * * *.' Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 501, 61 S. Ct. 643, 645, 85 L. Ed. 971. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.

* * * * * * *

"This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See City of Chicago v. Fielderest Dairies, Inc., supra, 316 U.S. at pages 172-173, 62 S. Ct. at page 988.

"The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the

necessity for federal constitutional adjudication, or at least materially change the nature of the problem."

****

"All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court. The Virginia declaratory judgment procedure, 2 Va. Code, 1950 Sec. 8-578 to 8-585, which the appellees are now pursuing with reference to Chapters 33 and 36, also provides an expeditious avenue here. And of course, we shall not assume that the Virginia courts will not do their full duty in judging these statutes in light of state and federal constitutional requirements.

****

"Accordingly, the judgment below will be vacated and the case remanded to the District Court, with instructions to afford the appellees a reasonable opportunity to bring appropriate proceedings in the Virginia courts, meanwhile retaining its own jurisdiction of the case, and for further proceedings consistent with this opinion."

In Williams v. Dalton, 231 F. 2d 646 (1956), the sixth circuit declined to entertain jurisdiction for declaratory relief under the Civil Rights Act. Judge Potter Stewart, now of the Supreme Court, stated on behalf of the Sixth Circuit:

> "It is well settled, however, that accepted principles governing equitable and declaratory relief are no less applicable where such relief is sought under the Civil Rights Act . . . Federal Courts have been chary of granting the declaratory or equitable relief in an area of possible friction between Federal and State jurisdictions."

It is a sensible conclusion for the Federal Courts to say that the State Courts should be given the first opportunity to construe their statutes, and if such construction does not adequately protect constitutional rights, the offended citizen may then take his problem to the Federal Court, which will review the State action to determine if a fair measure of justice has been done.

There are many reasons to apply this principle of abstention to the case before this Court. It is, we believe a problem for the Supreme Court of Tennessee to first say what the statutes involved in this case mean. If the Tennessee Supreme Court seems to give eventually the wrong answers to these questions, this Court may then proceed with a review of the State decisions to adequately protect the plaintiff's constitutional rights.

On the basis of the Harrison case the three-judge District Court saw fit to apply the doctrine of abstention as set forth in their opinion as follows:

> "In Harrison v. NAACP, 360 U.S. 167, the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated on page 176: 'This now well-established procedure is aimed at the avoidance of un-

necessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts, Matthews v. Rodgers, 284 U.S. 521, 525, as their contribution . . . in furthering the harmonious relation between state and federal authority . . ." Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not of course, involve the abdiction of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication.'

"Thus, in the light of the Harrison case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein."

CONCLUSION

It is, therefore, respectfully submitted that the appeal to this Court at this time is premature and should be dismissed.

FRANK B. GIANOTTI, JR.,
JAMES M. MANIRE
Memphis, Tennessee
Attorneys for Appellees

E. BRADY BARTUSCH
of Counsel

CERTIFICATE OF SERVICE

I, F. B. Gianotti, Jr., attorney herein and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon counsel of record for the appellants and other appellees a copy of the foregoing motion to dismiss by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on May 29, 1961, addressed as follows:

R. B. SUGARMON, JR.
588 Vance Avenue
Memphis, Tennessee

CONSTANCE BAKER MOTLEY
10 Columbus Circle
New York 19, N.Y.

THURGOOD MARSHALL
10 Columbus Circle
New York 19, N.Y.

JOHN M. HEISKELL
Commerce Title Building
Memphis, Tennessee

FRANK B. GIANOTTI, JR.,
Attorney for Appellees

LIBRARY
SUPREME COURT, U. S.
Office Supreme Court, U.S.
FILED
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 84

JESSE TURNER,

Appellant,

v.

CITY OF MEMPHIS, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

BRIEF FOR APPELLANT

CONSTANCE BAKER MOTLEY
10 Columbus Circle
New York 19, New York

JACK GREENBERG
10 Columbus Circle
New York 19, New York

R. B. SUGARMON
588 Vance Avenue
Memphis, Tennessee

Attorneys for Appellant.

JAMES M. NABRIT, III
DERRICK A. BELL
MICHAEL MELTSNER

of Counsel

TABLE OF CONTENTS

PAGE

Opinion Below 1

Jurisdiction 1

Constitutional Provisions, Statutes, Ordinances and Regulations Involved 2

Question Presented 4

Statement of the Case 5

Summary of Argument 10

ARGUMENT

I. Appellees' Policy of Racial Segregation in the Municipal Airport Restaurant Constituted State Action of a Nature So Clearly Prohibited by the Fourteenth Amendment That the Court Below Plainly Erred in Denying the Requested Injunction 12

II. The Court Below Erred in Applying the Doctrine of Abstention to the Facts of This Case 14

III. This Action Is One Required by Title 28 U. S. C., Section 2281 to Be Heard by a District Court of Three Judges and This Court Has Jurisdiction of This Direct Appeal Under Title 28 U. S. C., Section 1253 19

CONCLUSION 29

Table of Cases

PAGE

Alabama Public Service Commission v. Southern Railroad Co., 341 U. S. 341 18

Board of Supervisors v. Wilson, 340 U. S. 909, affirming 92 F. Supp. 986 (E. D. La. 1950) 13
Boman v. Birmingham Transit Co., 280 F. 2d 531 (5th Cir. 1960) 12
Browder v. Gayle, 142 F. Supp. 707 (1956) (D. C. Ala.), aff'd *per curiam*, 352 U. S. 903 20
Brown v. Board of Education of Topeka, 347 U. S. 483 (1954) 16, 21, 22
Bryan v. Austin, 354 U. S. 933 ..... 11, 25, 28
Burford v. Sun Oil Co., 319 U. S. 315 18
Burton v. Wilmington Parking Authority, 365 U. S. 715 ..... 10, 12, 16, 21
Bush v. Orleans Parish School Board, 138 F. Supp. 336 (E. D. La. 1956) mandamus den. 351 U. S. 948, aff'd 242 F. 2d 156 (5th Cir. 1956) cert. den. 354 U. S. 921 22

Clay v. Sun Insurance Co., 363 U. S. 207 17
Clemons v. Board of Education, 228 F. 2d 853 (6th Cir. 1956), cert. den. 350 U. S. 853 13
Cleveland v. United States, 323 U. S. 329 (1945) 20
Coke v. Atlanta, 184 F. Supp. 579 (N. D. Ga. 1960) 13
Cooper v. Aaron, 358 U. S. 1 (1958) 16
County of Allegheny v. Frank Mashuda Co., 360 U. S. 185 ..... 17, 18

Davis v. County School Board, 142 F. Supp. 616 (D. C. Va. 1956) 22
Derrington v. Plummer, 240 F. 2d 922 (5th Cir. 1956), cert. den., Casey v. Plummer, 353 U. S. 922 13

PAGE

Enelow v. New York Life Insurance Co., 293 U. S. 379 ..... 11, 26, 27
Ettleson v. Metropolitan L. Ins. Co., 317 U. S. 188 ..... 11, 26, 27, 28
Evers v. Dwyer, 358 U. S. 202 8
Ex Parte Poresky, 290 U. S. 30 22

Florida Lime and Avocado Growers v. Jacobsen, 362 U. S. 73 ..... 11, 19, 20

Glen Oaks Utilities, Inc. v. City of Houston, 280 F. 2d 330 (5th Cir. 1960) 11, 26, 27
Gov't Civic Employees Organization Com. v. Windsor, 347 U. S. 901, aff'g 116 F. Supp. 354 (N. D. Ala. 1953) (Order reprinted at 146 F. Supp. 214) 11, 25, 28
Gray v. Board of Trustees of the University of Tennessee, 100 F. Supp. 113 (E. D. Tenn. 1951) dismissed as moot, 342 U. S. 517 22
Great Lakes Dredge and Dock Co. v. Huffman, 319 U. S. 293 18

Harrison v. NAACP, 360 U. S. 167 ..... 9, 10, 19
Henry v. Greenville Airport Commission, 284 F. 2d 631 (4th Cir. 1960) 10, 13

La Buy v. Howes Leather Co., 352 U. S. 249 ..... 11, 27
Lambert Run Coal Co. v. Baltimore & O. R. Co., 258 U. S. 377 22
Louisiana Power & Light Co. v. Thibodaux, 360 U. S. 25, 26 ..... 11, 17, 18, 27

McLaurin v. Oklahoma State Regents, 337 U. S. 637 19
Martin v. Creasy, 360 U. S. 219 ..... 17, 18

PAGE

Muir v. Louisville Park Theatrical Association, 347 U. S. 971, vacating and remanding, 207 F. 2d 275 (6th Cir. 1953) 16

NAACP v. Bennett, 360 U. S. 471 ..... 11, 25, 28

Pennsylvania v. Williams, 294 U. S. 179 18
Phillips v. United States, 312 U. S. 246 ..... 20, 23

R. R. Comm. of Texas v. Pullman Co., 312 U. S. 496 17

Spielman Motor Sales v. Dodge, 295 U. S. 89 (1935) 20
State v. Lasater, 68 Tenn. 584 (1877) 17

Toomer v. Witsell, 334 U. S. 385 18

Union Tool Co. v. Wilson, 259 U. S. 107 ..... 10, 13

UNITED STATES STATUTES

Annotation: Three Judge Court, 4 L. ed. 2d 1931, 1958, Note 1 22

18 Stat. at L. 335 17

28 U. S. C. Sec. 1253 ..... 1, 10, 11, 19, 24, 28

28 U. S. C. Sec. 1343(3) 5

28 U. S. C.

Sec. 2281 ..... 19, 20, 23

Sec. 2282 28

Sec. 2284 ..... 21, 22, 23, 25

PAGE

STATE STATUTES AND REGULATIONS

Tenn. Code Ann.

Vol. 9, §53-2120 ..... 2, 6, 14, 15

Vol. 9, §53-2121 ..... 2, 6, 14

Vol. 11, §62-710 ..... 3, 8, 19

Tenn. Dept. of Conservation, Division of Hotel and Restaurant Inspection (Approved June 18, 1952 filed in Office of Secretary of State)

Regulation No. R-1 ..... 3, 15

Regulation No. R-18 (L) 3, 6, 15, 16, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 84

JESSE TURNER,

Appellant,

v.

CITY OF MEMPHIS, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

BRIEF FOR APPELLANT

Opinions Below

The per curiam opinion below is unreported but appears at pages A1-A3 of the Jurisdictional Statement.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1253, providing for direct appeals in cases required by Congress to be heard and determined by three judges. The order appealed from was entered below on February 10, 1961. Notice of appeal was filed in the District Court on March 1, 1961. The appeal docketed here on May 1, 1961. On October 9, 1961, this Court entered an order postponing consideration of the question of jurisdiction to the hearing on the merits and transferred case to summary calendar.

Constitutional Provisions, Statutes, Ordinances and Regulations Involved

This case involves the following provisions of the Tennessee Code relating to the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee:

> §53-2121—Rules and regulations authorized—Arbitration of inconsistencies.—The division is hereby authorized to make such rules and regulations, including a code of sanitation, as may be necessary to carry out the purpose of §§53-2101--53-2121 and to protect the public health and safety. In any instances where there is an inconsistency as between the requirements of the division and those of a local county, or city, health officer, such inconsistency is to be arbitrated by a three (3) man board consisting of the director, the local health officer concerned, and a third member to be chosen by these two. (Tenn. Code Ann. Vol. 9.) [1]

> §53-2120—Violation of regulations or provisions penalized.—Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant, who shall fail or refuse to comply with any of the provisions of §§53-2101--53-2121 or with the rules and regulations promulgated by the division, shall be deemed guilty of a misdemeanor, and shall be

---

[1] This section was amended, effective February 18, 1961, to read as follows:

> "Rules and regulations authorized—The division is hereby authorized to make such rules and regulations as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants in order to carry out the provisions of this chapter."

This amendment became effective after entry of the order of the court below.

> fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100) for each offense, and each day after sufficient notice has been given shall constitute a separate offense. (Tenn. Code Ann. Vol. 9.)

Involved also is Regulation No. R-18(L), promulgated by the Division, which provides:

> Restaurants catering to both white and negro patrons *should* be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952, filed in Office of Secretary of State.) (Emphasis added.)[2]

This case also involves another provision of the Tennessee Code:

> §62-710—Right of owners to exclude persons from places of public accommodation.—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of

---

[2] Regulation R-1 provides as follows:

"Definition of Terms.

* * *

(d) The term 'shall' as used in these regulations is mandatory.

(e) The term 'should' as used in these regulations indicates desirability.

* * *"

passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family. (Tenn. Code Ann. Vol. 11.)

The answer of appellee City of Memphis relied upon city ordinances as the basis for requiring segregation in restroom facilities in the airport. All parties agree that segregation is no longer enforced with respect to such facilities. However, the ordinances on which the City relied are set forth in the Jurisdictional Statement, Appendix B.

Question Presented

Whether the three-judge court below, in a case involving segregation of Negroes by the lessee of a municipally-owned airport restaurant, erroneously refused to issue a permanent injunction enjoining such segregation and incorrectly failed to exercise its jurisdiction, instead requiring appellant to file suit for declaratory judgment in the state

courts for interpretation of statutes, regulations and ordinances pleaded by appellees.

Statement of the Case

This suit for permanent injunction was instituted on April 1, 1960, by the appellant, Jesse Turner, who is an adult Negro citizen of the United States and of the State of Tennessee, residing in Memphis, Tenn. Appellant is the executive vice-president and cashier of the Tri-State Bank and a member of the Shelby County Democratic Executive Committee. He uses the Memphis Municipal Airport three or four times per year in connection with his business and public office (R. 3, 56-57). Appellant sought service in the main dining room of Dobbs Houses restaurant in the Memphis airport on April 28, 1959, and again on October 29, 1959. On each occasion he was denied service in the main dining room, solely on account of his race and color, by the hostess, but directed to a small room reserved for Negroes. Each time appellant asked to see the manager who advised him that Negroes were served in a separate, small room off to the side. Appellant declined these offers to be served on a racially segregated basis and left the restaurant (R. 23-24, 57).

Jurisdiction of the court below was invoked pursuant to the provisions of Title 28, United States Code, §1343(3). The complaint did not rely upon or seek to enjoin the enforcement of any specified state statute, state regulation or city ordinance. The complaint alleges, *inter alia*, that defendants, acting under color of the laws of Tennessee and ordinances of the City of Memphis, have adopted and presently pursue a policy, practice, custom and usage of segregating Negroes and white persons in the airport restaurant and restroom facilities (R. 3-4). The complaint sought to enjoin the city of Memphis and

the defendant, Dobbs Houses, Inc., the lessee of the city's airport restaurant (R. 2-3), from "making any distinctions based on race or color" in public facilities at the airport, including the restaurant (R. 4).

On April 21, 1961, all appellees filed answers in which they admitted public ownership of the airport, the segregation complained of, and the leasing of the restaurant to Dobbs Houses, Inc. (R. 5-21).

A copy of the lease, evidencing extensive public control over the leased premises, is attached to the City's answer and in paragraph 3 thereof it is provided that:

> 3. Lessee agrees to conduct a first-class cafe and to sell only such articles and wares as are sanitary, wholesome and clean and of the highest character, and agrees not to charge prices higher than those prevailing in the City of Memphis for the same articles. All novelties to be sold upon said premises must first be approved by the Lessor, or its authorized agent. (R. 9.)

This lengthy lease details the city's controls which relate to the use of the premises as an airport restaurant and the city's participation in the profits through a rental arrangement calculated on the basis of a percentage of gross sales (R. 8-17). The city granted this lessee "exclusive" rights (with limited exceptions) to sell food and other items at the airport (R. 10).

In their answers all appellees prayed for the convening of a three-judge court on the ground that the Division of Hotel and Restaurant Inspection had promulgated Regulation No. R-18(L), applicable to Dobbs Houses, pursuant to §53-2121 of the Tennessee Code, violation of which would constitute a misdemeanor punishable by fine under §53-2120 of the Tennessee Code (R. 7, 19-20).

Both appellees relied upon the regulation as justification for the segregation of Negroes in the restaurant and claimed that unless the regulation is declared unconstitutional "by a court of competent jurisdiction and of final review" appellees would consider it a violation of Tennessee law and the lease if separate facilities for the service of Negro and white citizens were not provided (R. 7, 21).

Appellee City of Memphis alleged that "the officials of the City of Memphis conceive it to be their duty to object to desegregation of the races by the defendant Dobbs Houses, Inc. in the airport restaurant, as a violation of the laws of the State of Tennessee, and, therefore, a violation of paragraph 20 of its lease with the City"—in the absence of a declaration of unconstitutionality of the regulation (R. 7).

Appellees, as a first defense, claimed that the complaint failed to state a claim upon which relief could be granted (R. 5, 18).

As a second defense Dobbs Houses alleged that, "As a matter of business practice and in accordance with custom and usage of the area it requires that negro customers be served in an area which is segregated from that in which white customers are served" (R. 19).

The regulation referred to above was its third defense and as a fourth defense it averred, that "it operates a restaurant at the Memphis Municipal Airport as a private facility to which the 14th Amendment does not apply, and that it has a legal right to enforce any rules and policies which it deems desirable in regard to the seating of patrons, including the right to seat and serve patrons in separate areas because of race and color" (R. 20-21). The City concurred (R. 7-8).

After the answers were filed, appellant moved for a summary judgment on May 18, 1960, on the ground that the attached affidavit of appellant and the pleadings showed no genuine issue as to any material fact and appellant was entitled to judgment as a matter of law (R. 21-24).

The motion for summary judgment came on for hearing before a single judge court, Judge Marion S. Boyd, on June 3, 1960. The court first heard argument on the question whether a three-judge court was required. Appellant contended that this case was not properly one for a three-judge court on the ground that there was no substantial constitutional question involved with respect to the regulation (R. 28) and that Section 62-710 is not involved in this case (R. 32). Appellee Dobbs Houses moved in open court for leave to amend their answer to specifically plead Section 62-710 of the Tennessee Code (R. 32). At the close of the hearing the court orally ruled: "This will be a three-judge hearing. And that means the motion for summary judgment is not acted upon, of course, at this time . . ." (R. 35).[5]

[5] On June 4, 1960, appellant's counsel wrote a letter to the chief judge of the Sixth Circuit, advised of the ruling of Judge Boyd on June 3, and requested the chief judge to arrange to have the case heard before the same three-judge court which was to sit in Memphis on June 27, 1961, to hear the case of *Evers* v. *Dwyer*, 358 U. S. 202, a case remanded by this Court for further proceeding consistent with its opinion (R. 41). A letter was addressed on the same date to Judge Boyd pointing out that a three-judge court, of which he was a member, would be sitting on the 27th, and respectfully requested him to take steps to have this case heard at that time (R. 41). On that same date, appellant served a second notice and motion for summary judgment on the Governor and Attorney General of Tennessee, as well as all defendants, putting them on notice that appellant would bring on his motion before a three-judge court on June 27, 1960. The motion was filed on June 6, 1960 (R. 36-37, 45). The three-judge court below, which was the same court which sat on the *Evers* case on June 27, 1960, was appointed by the chief judge of the Circuit by order dated June 9, 1960, but the order was not filed with the Clerk below until June 20, 1960 (R. 46). On June 27, appellant's counsel appeared

Thereafter, the case came on for trial before the court below on November 9, 1960 (R. 47). Neither the Governor nor the Attorney General has appeared, answered, or filed any brief in this case.

Prior to the trial, on November 2, 1960, appellees moved the court for leave to amend their answer to rely on the doctrine of abstention (R. 48-51). These motions were granted at the trial (R. 51-53).

On the trial, appellant testified that in addition to being refused service on April 28, 1959, as alleged in his complaint, he was denied service on October 29, 1959 by the manager of Dobbs Houses (R. 57). Appellees offered no testimony and the case was taken under advisement.

On January 23, 1961, the court rendered a brief per curiam opinion holding that, ". . . the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of state statutes, regulations and city ordinances under consideration herein" (R. 89). In so doing, reliance was placed wholly and solely upon this Court's decision in *Harrison* v. *NAACP*, 360 U. S. 167 (R. 88).

Thereafter, an abstention order was entered on February 10, 1961, holding the case in "abeyance pending the filing of such suit and an interpretation of the State statutes involved herein (R. 89-90)."

---

in court pursuant to the June 4th notice of motion, but the three-judge court declined to hear the case on the ground that appellees were not ready (R. 42) and on the ground that the case had not been set for hearing by that three-judge court or by the district judge (R. 43).

Notice of Appeal to this Court was filed on March 1, 1961, and the case docketed here on May 1, 1961. On October 9, 1961, this Court entered an order postponing further consideration of the question of jurisdiction until the hearing of the case on the merits and transferred same to the summary docket.

On March 1, 1961, appellant also filed a notice of appeal to the Court of Appeals for the Sixth Circuit; docketed his appeal there on May 25, 1961, pursuant to extension of time order; and on May 26, 1961, moved that court for an order staying all further proceedings on that appeal pending disposition of the instant appeal by this Court, which stay was granted on June 5, 1961.

Summary of Argument

The restaurant in the Memphis Municipal Airport, leased by exclusive franchise to appellee Dobbs Houses, Inc., is a public facility in which discrimination against Negro patrons violates equal protection standards of the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. The facts and law are so clear in this case that the court below lacked discretion to refuse to grant appellant prompt relief. *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Henry* v. *Greenville Airport Commission*, 284 F. 2d 631 (4th Cir. 1960).

The doctrine of abstention was improperly invoked since no construction placed on the state statutes and regulation in question would have avoided the constitutional issue pleaded and proved. *Harrison* v. *NAACP*, 360 U. S. 167, was improperly relied upon below as justifying abstention under the facts of this case.

The direct appeal of this case, as authorized by Title 28, United States Code, §1253, is proper both because the

court below was properly convened as a statutory three-judge court, since an injunction may have issued on the ground of unconstitutionality of the state regulation and statutes relied upon, *Florida Lime and Avocado Growers Inc.* v. *Jacobsen*, 362 U. S. 73, and because the court below denied appellant's injunction plea in terms similar to other orders reviewed by this Court. *Bryan* v. *Austin*, 354 U. S. 933; *NAACP* v. *Bennett*, 360 U. S. 471. Appealability of an order depends upon its effect rather than its terminology. *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188; *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330, 333 (5th Cir. 1960). The legal operation and effect of the order appealed from would be the same even if it had included the word "denied" as in *Gov't & Civic Employees Organization Com.* v. *Windsor*, 347 U. S. 901, aff'g 116 F. Supp. 354 (N. D. Ala. 1953). Non-appealability of the order would necessitate resort to writ of mandamus to require the entry of an order expressly stating that the injunction is denied. Cf. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249.

The direct appeal prerequisites of Section 1253 are also satisfied by applying the doctrine of the line of this Court's decisions which hold that the stay order itself is to be regarded as granting an injunction, since by its substantial effect, it restrains further proceedings in the federal court pending action in the state courts. *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188, 192; *Enelow* v. *New York L. Ins. Co.*, 293 U. S. 379; *Louisiana Power and Light Co.* v. *Thibodaux*, 360 U. S. 25, 26, note 1.

Clearly, a conclusion of non-appealability attributed to the order of the court below would frustrate the congressional intent explicit in § 1253 which makes reviewable by this Court decisions of three-judge courts in cases seeking to enjoin state laws.

I

Appellees' Policy of Racial Segregation in the Municipal Airport Restaurant Constituted State Action of a Nature So Clearly Prohibited by the Fourteenth Amendment That the Court Below Plainly Erred in Denying the Requested Injunction.

Last term, *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, held subject to the equal protection clause of the Fourteenth Amendment a restaurant facility in a municipally owned parking building leased to a private operator. After a review of the lease's terms the majority concluded:

> Addition of all these activities, obligations and responsibilities of the authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. 365 U. S. 715.

Certainly the degree of "participation and involvement" found in the *Burton* case may be found in the lease here. Indeed, the lease between the City of Memphis and Dobbs Houses, Inc. (R. 8-17), suggests that this lessee is virtually an agent of the City. In addition to denoting the leased areas (Par. 1), all of which are publicly owned, and granting the exclusive franchise to sell food, periodicals, and novelties at the Memphis airport (Par. 7) (sufficient in itself to invoke the equal protection clause, see *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960)), the City retained control over what lessee could sell, how much could be charged (Pars. 3, 5, 6), and how prices should be displayed (Par. 9). Twenty-four hours operation daily

was required (Par. 4); and lessee agreed to discharge employees adjudged "reprehensible" by the City's agent (Par. 14). Additional equipment installed by lessee (Par. 15), and location of equipment and vending machines outside of building (Par. 16) was to be approved by the City. Dobbs Houses was not required to pay a fixed rental—rather, the City receives six percent of the gross from all sales except those designated as gift items, on which the City receives 10 percent (Par. 10).

A weighing of these controls, obligations, and mutual benefits on the scale of the *Burton* case, left no room for the court below to avoid the conclusion that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." 365 U. S. at 715. See also, *Coke* v. *Atlanta*, 184 F. Supp. 579 (N. D. Ga. 1960); *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. *Casey* v. *Plummer*, 353 U. S. 922, and other cases collected in *Burton*, *supra*, note 2.

The essential facts in this case have never been in dispute, and the law to be applied is clear. Without any question, appellant was entitled to an injunction granting his requested relief. "Legal discretion . . . does not extend to refusal to apply well-settled principles of law to a conceded state of facts." *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 112. See also, *Henry* v. *Greenville Airport Commission*, 284 F. 2d 631 (4th Cir. 1960); *Clemons* v. *Board of Education*, 228 F. 2d 853 (6th Cir. 1956), cert. den. 350 U. S. 853; *Board of Supervisors* v. *Wilson*, 340 U. S. 909, affirming 92 F. Supp. 986 (E. D. La. 1950).

II

The Court Below Erred in Applying the Doctrine of Abstention to the Facts of This Case.

After this case was submitted on the merits, the court below stayed all proceedings pending suit for declaratory judgment by appellant in the state courts for construction of the statutes under consideration.

Appellant does not understand appellees or the court below to claim that the constitutionality of Sections 53-2120 (misdemeanor to fail to comply with regulations of hotel division), and 53-2121 (division authorized to make rules and regulations)[1] is questioned by anyone in this case, or that any party to this case sought to enjoin enforcement of these statutes on constitutional grounds. Dobbs Houses' answer leaves no doubt that, quite apart from the regulation and statutes in question, its own policy is to segregate Negroes in this municipally owned restaurant facility which it has leased.

Consequently, even assuming *arguendo*, that the Tennessee courts should hold that under Section 53-2121 the Division is without power to promulgate a regulation permitting segregation in restaurants, the constitutional question raised by the complaint is not avoided, mooted, or altered in any material way. The question is still whether this lessee's policies are proscribed by the prohibitions of the Fourteenth Amendment.

---

[1] Since the order below was entered, Section 53-2121 has been amended, effective February 18, 1961, to read as follows:

> "Rules and regulations authorized—The division is hereby authorized to make such rules and regulations as may be necessary pertaining to the safety and or sanitation of hotels and restaurants in order to carry out the provisions of this chapter."

Regulation No. R-18 (L), violation of which is a misdemeanor under §53-2120, provides as follows:

> Restaurants catering to both white and negro patrons *should* be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Emphasis added.)[5]

The Division's first regulation, Regulation R-1, defines terms used in the regulations:

"Definition of Terms.

* * * * *

(d) The term 'shall' as used in these regulations is mandatory.

(e) The term 'should' as used in these regulations indicates desirability.

* * * * *"

In the light of these definitions, restaurant segregation is clearly not mandatory. The construction of Section 53-2120 by the Tennessee courts is therefore not necessary to a determination of the constitutional question presented because if Dobbs Houses does not segregate, either as a matter of volition or under court compulsion, it is shielded by the nonsegregation option which the regulation affords.

However, since Dobbs Houses has elected to stand on the regulation as justification for its segregation, the question

---

[5] Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952, filed in Office of Secretary of State.

remains whether there is necessity for the Tennessee courts to construe this regulation to avoid premature constitutional adjudication. Plainly, there is no justification for invoking abstention with respect to this regulation since no construction can make it constitutionally palatable. Appellant can find no authority whatsoever for the proposition that, where a state policy is clearly and unavoidably unconstitutional on its face, comity dictates that state courts be allowed the privilege of a prior declaration to this effect. Such a requirement would not be abstention but a patent abdication of the duty imposed upon federal courts.

Regulation No. R-18 (L) which permits segregation in a municipally owned restaurant leased to a private corporation to operate as a first class cafe for the benefit of the public using the airport is void on its face. *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954) (Kansas had a permissive school segregation statute); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Muir* v. *Louisville Park Theatrical Association*, 347 U. S. 971, vacating and remanding, 207 F. 2d 275 (6th Cir. 1953). See *Cooper* v. *Aaron*, 358 U. S. 1, 19 (1958). Moreover, if the Tennessee courts should hold the regulation inapplicable to Dobbs Houses, the constitutional question again remains the same in view of the position taken by Dobbs Houses. Dobbs Houses also elected to rely upon §62-710 of the Tennessee Code which abrogated the common law rule giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement. If the Tennessee courts should hold that this statute furnishes Dobbs Houses the legal foundation for discrimination against Negroes, the constitutional question remains unchanged. Cf. *Burton* v. *Wilmington Parking Authority, supra* (concurring and dissenting opinions). If the Tennessee courts should hold that this statute does not

apply to restaurants, contrary to what appears to be the clear intent or purpose of this statute passed in 1875 to counteract the supposed effects of the Civil Rights Act of 1875,* see *State* v. *Lasater*, 68 Tenn. 584 (1877), the posture of the constitutional question here is the same.

No abstention principle is more firmly established than this Court's repeated pronouncement that federal courts must postpone the exercise of jurisdiction in the face of a federal constitutional issue when it appears the issue might be avoided, mooted or presented in a different posture by a state court determination of pertinent state law. *Clay* v. *Sun Insurance Co.*, 363 U. S. 207; *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U. S. 25; *Harrison* v. *NAACP*, 360 U. S. 167; *Martin* v. *Creasy*, 360 U. S. 219; *R.R. Comm. of Texas* v. *Pullman Co.*, 312 U. S. 496; see, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 189.

In *Harrison* v. *NAACP*, *supra*, the sole case relied on below, this Court held that abstention was justified with respect to the three statutes involved in that appeal since this Court was unable to agree on the terms of those statutes left "no reasonable room for construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem." (At p. 177.)

But as demonstrated above, there is no construction which the Tennessee courts could give to the statutes and regulations relied on by appellees which would obviate the necessity for deciding the constitutional issue. The instant case, therefore, is not in the same category with the *Harrison* case.

If consideration is given the other principles underlying this Court's development and extension of the doctrine of

---

* 18 Stat. at L. 335.

abstention, it is likewise clear that none of these is applicable here. This Court has required District Courts to postpone exercise of jurisdiction where the exercise of that jurisdiction would interfere with a state's administrative processes, *Burford* v. *Sun Oil Co.*, 319 U. S. 315 and *Pennsylvania* v. *Williams*, 294 U. S. 179, or collide with the state's right to collect taxes, *Toomer* v. *Witsell*, 334 U. S. 385, 392 and *Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U. S. 293, or result in needless friction by unnecessarily enjoining state officers from executing state policy concerned with matters of wholly local concern. *Alabama Public Service Commission* v. *Southern Railroad Co.*, 341 U. S. 341. All of these reasons for abstention have been based upon comity. See, *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, at 189.

More recently, this Court has required abstention where, in addition to all of the foregoing reasons, the case involves "complex and varying effects" on individual situations involved, *Martin* v. *Creasy*, *supra*, or where the problem involved "is intimately related to state sovereignty" and the state law question may be decisive of the issues touching upon the relationship of city to state. *Louisiana Power & Light Co.* v. *Thibodaux*, *supra*.

None of the above considerations is involved here. Controlling here is this Court's recent admonition that abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, at pages 188-189. No reason to invoke the narrow exception is presented by the facts or the law herein.

Indeed, the order directing appellant here to the state court for declaratory judgment served no apparent purpose but frustration of constitutional rights long denied.

III

This Action Is One Required by Title 28 U. S. C., Section 2281 to Be Heard by a District Court of Three Judges and This Court Has Jurisdiction of This Direct Appeal Under Title 28 U. S. C., Section 1253.

A. This case meets the requirements for the convening of a three-judge district court which is required for the granting of:

> "... an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, ... upon the ground of the unconstitutionality of such statute ..."

This is such an action. The term "statute" comprehends administrative orders as well as state legislative enactments provided they are of state-wide application. *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73, 74, *McLaurin* v. *Oklahoma State Regents*, 337 U. S. 637.

Section 62-710, Tenn. Code Ann., Vol. 9 and Regulation No. R-18 (L), set out above at page 3, were raised as defenses to appellant's allegation that appellees, acting under color of the laws of Tennessee, had adopted and were enforcing a policy, practice, custom and usage of segregating Negroes and whites in the airport restaurant. Both the statute and the rule have statewide application.

Appellees' claim is that the statute and regulation authorized the challenged discrimination and were constitutional until declared otherwise by a court of final review (R. 7-8, 19-20, 38). They thus interposed the state policy evidenced in the regulation against a claim of unconstitutional state action raised by the face of the complaint. It therefore clearly appeared from the complaint and answer that there was involved here an effort to bring about "statewide doom by a federal court of a state's legislative policy," *Phillips* v. *United States*, 312 U. S. 246, 251. So that this doom would not be brought about in an "improvident" manner, *Ibid.*, three judges were summoned.

In the *Florida Lime and Avocado* case, *supra*, this Court ruled:

> Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality. (At p. 571.)

This action also involves "restraining the action of . . . [an] officer of such state." See *Cleveland* v. *United States*, 323 U. S. 329 (1945), where local officials were held to be officers of the state when enforcing state-wide policy; *Browder* v. *Gayle*, 142 F. Supp. 707 (1956) (D. C. Ala.) aff'd *per curiam*, 352 U. S. 903, where bus drivers were held to be officers of the state in that they had the authority to enforce state policy; *Spielman Motor Sales* v. *Dodge*, 295 U. S. 89, 94 (1935).[7] Appellee City of Memphis could only

[7] "Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves."

be restrained by an injunction against its officers. Municipal officers, of course, may be considered state officers for purposes of three-judge court jurisdiction when they enforce statewide policy, *Ibid.* Moreover, Dobbs Houses, Inc., as lessee of city property on which it is operating a public accommodation also is an agency of the state within the contemplation of this Court's decisions construing the Fourteenth Amendment's restraints. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

That the statute and administrative order were raised by way of defense rather than by way of complaint is of no consequence because the purpose of §§2281 to 2284 is to prevent improvident statewide doom by a federal court of a state's legislative policy. If this were not the rule then statewide policy could be brought before a one-judge court at any time at the choice of the plaintiff who could elect to sue the person enforcing the policy to enjoin his conduct rather than in terms seeking to enjoin his application of a statute. It is incredible, for example, that the school segregation cases, *Brown* v. *Board of Education*, 347 U. S. 483, could properly have been heard before a one-judge court merely at the option of plaintiffs who without mentioning state segregation laws could sue an elementary school principal for his conduct in excluding a Negro child although such a principal was, in fact, acting pursuant to the mandate of state statute. Since congressional policy is that statewide policy as expressed in statutes and administrative orders of statewide application should receive the mature consideration of three judges, rather than one, and should be amenable to speedy review by this Court, it would be a serious blow to the congressional scheme if the forum were determined by such tactical considerations. Therefore, this Court has held that the jurisdictional scheme requires that jurisdiction of a three-judge court

may not be defeated by the failure of plaintiffs to pray for it where the case involves a statute which could be enjoined upon the ground of unconstitutionality even though the law might be raised by defendant in his answer, *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377, 382.

That a statutory scheme provides an option to segregate rather than an inflexible requirement makes no difference for three-judge court jurisdiction because schemes of this sort fall also under §§2281-2284. Indeed, *Brown* v. *Board of Education of Topeka*, 347 U. S. 489, itself, involved an optional segregation statute.

That the unconstitutionality of defendants' action taken under the statutes and regulation and otherwise is patent does not obviate the need for a three-judge court. Section 2281 is clear in stating that no injunction of the kind sought here shall "be granted . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges. . . ." *Ex parte Poresky*, 290 U. S. 30, a pronouncement by this Court on the effect of the substantiality of the constitutional question on the operation of §2281 et seq. is not to the contrary. *Poresky* was a case where the injunction was denied, not granted.

Appellant recognizes that a number of district courts have granted injunctions against the enforcement of obviously unconstitutional state segregation statutes while sitting as single judge courts. See *Gray* v. *Board of Trustees of the University of Tennessee*, 100 F. Supp. 113 (E. D. Tenn. 1951) dismissed as moot, 342 U. S. 517, and see discussion of this point in *Davis* v. *County School Board*, 142 F. Supp. 616, 617 (D. C. Va. 1956); *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, mandamus den. 351 U. S. 948, aff'd 242 F. 2d 156 (5th Cir.) cert. denied 354 U. S. 921. And see cases collected in Anno:

Three-Judge Court, 4 L. ed. 2d 1931, 1958, Note 1. The policy considerations in terms of efficient judicial administration suggested by these decisions are perhaps best expressed by *Phillips* v. *United States*, 312 U. S. 246, 250, 251, in which Mr. Justice Frankfurter pointed out that the requirement of three judges "entails a serious drain upon federal judicial system" and that the appealability of three judge court orders directly to this Court places a strain upon the docket of this Court. It may be, therefore, that notwithstanding the language of 2281-2284, this Court appropriately might construe the three judge court act to permit a single judge district court to enjoin the enforcement of a clearly unconstitutional statute as suggested in the segregation suits cited above. On the other hand, while single judge action in such cases may be permissible for reasons of sound judicial administration, where three judges actually do take jurisdiction in a case involving an injunction against the enforcement of a state statute based on its constitutionality such jurisdiction properly has attached under the very terms and policy of §§2281-2284. It would be a much heavier burden on the federal judiciary for such a case to be subject to multiple reviews, first in this Court, then in the Court of Appeals and then once more in this Court. For, if this Court now determines that the case was cognizable by one judge and one judge only, appellant would then have to pursue his appeal before the Sixth Circuit whose judgment would be reviewable here on the merits. Appellant's position therefore, is this: The case falls within the language and policy of §§2281-2284. As such, three judges who took and exercised jurisdiction lawfully possessed such jurisdiction and the cause is appealable directly to this Court. Although an alternative construction of §§2281-2284 might justify—in the light of pressing problems of judicial administration—a single judge entering an injunction against the segre-

gation here complained of, once three judges took jurisdiction of the case it was properly theirs and is appropriately reviewable here.

B. Title 28, United States Code, 1253 provides for direct appeal by any party to this Court:

> "... from any order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In this case, after due notice, there was a hearing before a district court of three judges on appellant's prayer for a permanent injunction which appellees claimed and the court below agreed involved state statutes which the court might be required to enjoin (R. 4, 7, 53-62).

Thus, the requirements of Section 1253 were met in this case when the three-judge court below held a hearing on the merits of appellant's claim for injunctive relief, which involved the claim of constitutionality of alleged applicable state statutes, heard all the evidence of the parties and, after the hearing, issued a major order which, in actual operation and effect, either granted or denied the injunction sought.

The order entered here which effectively denied the relief requested provides *inter alia*,

> "It Is, Therefore, Ordered, Adjudged and Decreed, that said Cause be and the same is hereby held in abeyance pending the filing of such suit for interpretation of the State statutes involved herein" (R. 90).

It is clear from prior decisions of this Court in reviewing similar orders that such orders are appealable under Section 1253. In *Bryan* v. *Austin*, 354 U. S. 933, this Court took jurisdiction of and vacated a similar order.[8] Likewise, in *NAACP* v. *Bennett*, 360 U. S. 471, this Court vacated a similar order and remanded the case.[9]

There appears to be no question that stay orders issued by three-judge courts applying abstention where injunctive relief is sought are directly appealable to this Court. *Gov't & Civic Employees Organization Com.* v. *Windsor*, 347 U. S. 901, aff'g 116 F. Supp. 354 (N. D. Ala. 1953) (Order reprinted at 146 F. Supp. 214, 215).

The only stay orders issued by three-judge courts which may not be appealable are those issued pursuant to Title 28, §2284 requiring a stay in those instances where the state has agreed to stay statutes attacked as unconstitutional pending its own state court test. Also, stay orders which are merely a procedural step in the nature of a short continuance, stemming from the inherent power of a District

---

[8] The Order in the *Bryan* case, which is on file in this Court, No. 931, October Term 1956 provided:

"... it is ordered that the case be retained and remain pending upon the docket but that proceedings therein be stayed to permit the plaintiffs a reasonable time for the exhaustion of state administrative and judicial remedies, after which such further proceedings, if any, will be had by this court as may then appear proper in the premises." (Jurisdictional Statement, p. 43a.)

[9] The Order in the *Bennett* case is on file in this Court as No. 757, October Term 1958, and it provided:

"On this day, pursuant to the opinion of the Court rendered by Judge Sanborn, it is ORDERED, That the motion for a stay of proceedings filed herein by the defendant, Bruce Bennett, Attorney General of the State of Arkansas, and joined in by certain other defendants, be, and the same is, granted, and that this Court will retain jurisdiction of this cause until efforts to obtain an appropriate adjudication in the state courts have been exhausted."

Court to control the progress of a cause likewise may not be reviewable. *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379.

While the order of the court below does not use the words "injunction denied", the order in actual operation and effect denies the injunctive relief sought, and, instead of relief, stays the action indefinitely until appellant is able to obtain from the courts of Tennessee a declaratory judgment interpreting the questioned state statutes. There is no indication in the order that appellant's injunction request is still under advisement. Rather, the court's order leaves no doubt that no further proceedings will be had until there has been a state court construction (R. 89).

Logically and properly, whether "an order is subject to appeal depends upon its effect, rather than its terminology." *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330, 333 (5th Cir. 1960); *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188.

While the order in *Windsor*, *supra*, which was affirmed here, did recite that "the final relief for which plaintiffs prayed in their complaint is hereby denied", before reciting that jurisdiction was retained pending state court construction of the statute, it is obvious that the actual legal operation and effect of that order was the same as the effect of the abstention orders in the *Bryan* case, *supra*, the *Bennett* case, *supra*, and in the instant case.

A contrary view of the nature of such orders—that is, one which views the trial court as not having "denied" the demand for injunctive relief—would require appellant to seek an extraordinary writ of mandamus requiring the court below to enter an order expressly stating that it did deny the injunction. That such relief would be available if needed seems plain from the rationale of both the

majority and dissenting opinions in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, where the Court approved a writ of mandamus issued to compel a trial judge to vacate an order of reference to a master. Without some such alternative remedy a trial court order refusing to grant an injunction would become beyond this Court's jurisdiction to review by simply not reciting that it was an order of denial. The All Writs Act, however, was plainly designed to provide a remedy against such a situation.

There is, of course, an alternative theory of appealability applicable here. Under the doctrine of *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188, 192; *Enelow* v. *New York L. Ins. Co.*, 293 U. S. 379, and *Louisiana Power and Light Co.* v. *Thibodaux*, 360 U. S. 25, 26, note 1, if even limited effect is given to the abolition of the old distinction between law and equity (Rule 1, Federal Rules of Civil Procedure), the stay order may itself be regarded as an injunction which by its substantial effect restrains further proceedings in the federal court pending the action in the state courts. Indeed, if the stay order in this case is held to be neither a denial of an injunction requested nor an injunction itself, and thus unappealable, the case law will have created the following incredible and unconscionable anomaly: Appeals would be allowed from stay orders in law actions (where no injunction was sought) on the fiction that a stay is an injunction against further proceedings in the court issuing it (as in the *Thibodaux* case); but appeals would not be allowed from stay orders issued in suits where an injunction is actually sought and not granted pending state court action merely because the court staying the case chooses not to use the words "injunction denied" in its order. See *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330 (5th Cir. 1960). If the "substantial effect" principle in appraising judgments is to be applied

in aid of a fiction as in *Ettleson, supra*, 317 U. S. at 192, it should also be applied here in aid of reality.

The action of the court below was in fact a denial of injunctive relief; it should therefore be regarded as a denial in law under §1253. *Bryan* v. *Austin, supra*, *NAACP* v. *Bennett, supra*, *Glen Oaks Utilities* v. *City of Houston, supra*. Cf. *Govt. & Civic Employees Organizing Com.* v. *Windsor, supra*.

Finally and fundamentally, the plain purpose of Congress in enacting §1253 was to make consequential decisions of three-judge courts reviewable on direct appeal to this Court. The Congressional purpose was to insure that decisions disposing of the important and special class of cases where three-judge courts are required could be directly and promptly appealed to this Court. This purpose was carried out by §1253 which allows appeals from orders granting or denying temporary or permanent injunctions since applications for such injunctions are present in all cases where three-judge courts are required under 28 U. S. C., §§2281 and 2282. A rule that stay orders issued in the context of the judicially created equitable abstention doctrine are not reviewable would frustrate the Congressional plan of making the decisions of the three-judge courts on requests to enjoin state laws reviewable by this Court.

CONCLUSION

It is, therefore, respectfully requested that this Court vacate the order of the court below and direct that court to enter an injunction granting appellant the relief prayed for in the complaint.

Respectfully submitted,

CONSTANCE BAKER MOTLEY
16 Columbus Circle
New York 19, New York

JACK GREENBERG
10 Columbus Circle
New York 19, New York

R. B. SUGARMON
588 Vance Avenue
Memphis, Tennessee

Attorneys for Appellant.

JAMES M. NABRIT, III
DERRICK A. BELL
MICHAEL MELTSNER

of Counsel

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of December, 1961, I mailed a copy of Appellant's Brief to the following attorneys for the City of Memphis and Dobbs Houses, Inc., by sending a true copy of same to them via regular United States Airmail, Special Delivery, postage prepaid:

Frank B. Giannoti, Jr., Esq.
City Attorney for Memphis
146 North Third Street
Memphis, Tennessee

James M. Manire, Esq.
Attorney for the
City of Memphis
146 North Third Street
Memphis, Tennessee

Edward P. A. Smith, Esq.
Attorney for Dobbs Houses
1118 Commerce Title Building
Memphis 3, Tennessee

John M. Heiskell, Esq.
Attorney for Dobbs Houses
Commerce Title Building
Memphis 3, Tennessee

CONSTANCE BAKER MOTLEY
Attorney for Appellant

Office-Supreme Court, U.S.
FILED
JAN 2 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 84

JESSE TURNER,

Appellant,

v.

CITY OF MEMPHIS, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

BRIEF OF APPELLEE, CITY OF MEMPHIS

FRANK B. GIANOTTI, JR.
146 N. Third Street
Memphis, Tennessee

JAMES M. MANIRE
146 N. Third Street
Memphis, Tennessee

DAVID L. SIMPSON,
146 North Third Street
Memphis, Tennessee
of Counsel

TABLE OF CONTENTS

PAGE

Opinion Below 1

Jurisdiction 1

Constitutional Provisions, Statutes, Ordinances and Regulations Involved 1

Question Presented 4

Statement of the Case 4

Summary of Argument 4

ARGUMENT

When a Constitutional Issue May Be Avoided by a State Court Interpretation of State Law, the Doctrine of Judicial Abstention Should Be Applied 5

CONCLUSION 13

Table of Cases

PAGE

Alabama Public Service Commission v. So. R. R. Co., 341 U. S. 341 (1951) 8

Brown v. Board of Education of Topeka, 347 U. S. 483 (1954) 12

Burford v. Sun Oil Co., 319 U. S. 315 (1943) 8

Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) 10

City of Chicago v. Fielderest Dairies, Inc., 316 U. S. 168 (1942) 7

City of Meridian v. Southern Bell Tel. & Tel., 358 U. S. 639 (1959) 7

County of Allegheny v. Frank Mashuda Co., 360 U. S. 185 (1959) 7

Harrison v. N. A. A. C. P., 360 U. S. 167 (1959) 5, 6, 8

Louisiana Power & Light Com. v. Thibodaux, 360 U. S. 25 (1959) 7

Martin v. Creasy, 360 U. S. 219 (1959) 12

Matthews v. Rodgers, 284 U. S. 521 (1932) 5

Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941) 6, 7

Roy v. Brittain, 201 Tenn., 140, 297 S. W. 2d 72 (1956) 11

Shipman v. DuPre, 339 U. S. 321 (1950) 7

Spector Motor Service v. McLaughlin, 323 U. S. 101 (1944) 7

Toomer v. Witsell, 334 U. S. 385 (1948) 8

State Statutes and Regulations

PAGE

Tenn. Code Ann.

Vol. 9, Sec. 53-2120 ..... 2, 8

Vol. 9, Sec. 53-2121 ..... 2, 8

Vol. 11, Sec. 62-710 ..... 3, 10

Vol. V, Sec. 23-1101, et seq. 11

Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952.

Regulation No. R-18 (L) 2, 9

Regulation R-1 ..... 3, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 84

JESSE TURNER,

Appellant,

v.

CITY OF MEMPHIS, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

BRIEF OF APPELLEE, CITY OF MEMPHIS

Opinions' Below

The per curiam opinion below is unreported but appears at pages A1-A3 of the Jurisdictional Statement.

Jurisdiction

Appellee submits to the jurisdiction of this Court.

Constitutional Provisions, Statutes, Ordinances and Regulations Involved

This case involves the following provisions of the Tennessee Code relating to the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee:

Sec. 53-2121—Rules and regulations authorized—Arbitration of inconsistencies.—The division is hereby authorized to make such rules and regulations, including a code of sanitation, as may be necessary to carry out the purpose of Sections 53-2101—53-2121 and to protect the public health and safety. In any instances where there is an inconsistency as between the requirements of the division and those of a local county, or city, health officer, such inconsistency is to be arbitrated by a three (3) man board consisting of the director, the local health officer concerned, and a third member to be chosen by these two. (Tenn. Code Ann. Vol. 9.)

Sec. 53-2120—Violation of regulations or provisions penalized.—Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant, who shall fail or refuse to comply with any of the provisions of Sections 53-2101—53-2121 or with the rules and regulations promulgated by the division, shall be deemed guilty of a misdemeanor, and shall be fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100) for each offense, and each day after sufficient notice has been given shall constitute a separate offense. (Tenn. Code Ann. Vol. 9.)

Involved also is Regulation No. R-18 (L), promulgated by the Division, which provides:

Restaurants catering to both white and negro patrons *should* be arranged so that each race is properly segregated.

> Segregation will be considered proper where each race *shall* have separate entrances and separate facilities of every kind necessary to prevent patrons of the difference races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952, filed in Office of Secretary of State) (Emphasis added)

This case also involves the following provision of the Tennessee Code:

> Sec. 62-710 Right of owners to exclude persons from places of public accommodiation.—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and

Regulation R-1 provides as follows:
"Definition of Terms
* * * * *
(d) The term 'shall' as used in these regulations is mandatory.
(e) The term 'should' as used in these regulations indicates desirability.
* * * * *

> keep ... of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family. (Tenn. Code Ann. Vol. 11.)

There was no proof offered of the ordinances of the City of Memphis relating to segregation in rest room facilities at the Memphis Municipal Airport.

Question Presented

Whether the action of the District Court was proper in refusing to issue a permanent injunction and in applying the doctrine of abstention requiring Appellant to file suit for a declaratory judgment in the Courts of the State of Tennessee in order to obtain an authoritative interpretation of Tennessee statutes.

Statement of the Case

Appellee, City of Memphis, admits the facts as stated by the Appellant, beginning at page 5 of its brief.

Summary of Argument

The distinguished three judge court below properly required Appellant to repair to the Tennessee Courts for an interpretation of Tennessee law. In applying the abstention principle to the facts of this case, it is evident that the Court below felt that the posture of Appellant's case would be considerably changed by a state court interpretation of the statutes involved. Although Appellant submitted only

two possible interpretations for each set of statutes involved, it is manifest that there are many others which would moot the consitutional issue. Appellant's position is not substantially altered by the application of abstention and, in addition, there is no possibility of friction or conflict between national and state laws.

ARGUMENT

When a constitutional issue may be avoided by a state court interpretation of state law, the doctrine of judicial abstention should be applied.

Acting on the well established doctrine of abstention as applied to the facts of the instant case, the three judge court below required the appellants to seek an interpretation of Tennessee law by Tennessee Courts in order to avoid potential constitutional issues. The Court below stated in part:

> "In Harrison v. NAACP, 360 U.S. 167, the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated on page 176: 'This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," Matthews v. Rodgers, 284 U.S. 521, 525, as their contribution • • • in furthering the harmonious relation between state

and federal authority . . .' Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication.

"Thus, in the light of the *Harrison* case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein." Also see Appendix "A", Jurisdictional Statement of the appellant, and *Harrison v. NAACP*, 360 U.S. 167 (1959) (at pp. 176-177).

Thus, the three judges realized that the exercise of their jurisdiction would entail a possibility of premature and perhaps unnecessary decision of a serious constitutional question. This possibility is averted not by refusing to entertain jurisdiction, but by holding the case in abeyance while resort is had to state courts for an authoritative interpretation of state law.

This doctrine of abstention, while "a narrow and extraordinary exception to the duty of a District Court to adjudicate . .". *County of Allegheny v. Frank Mashuda Co.*, 360 *U.S.* 185, is nevertheless a valid and well established exception. Indeed, on June 8, 1959, the same day in which this Honorable Court decided the *Mashuda Co.* case, *supra*, this Honorable Court is affirming the U. S. District Court for the Eastern District of Louisiana, decided that a District Court could, *on its own motion*, apply the doctrine of abstention, if the situation warrants. *Louisiana Power & Light Company v. Thibodaux*, 360 *U.S.*, 25 (1959). Thus, abstention is not merely a defense to be either pleaded or waived, but a doctrine which the Court may apply on its own motion.

The Court below said that the statutes involved must be construed by the State Courts. Therefore, the issue before this Honorable Court is precise. It is necessary to take only two steps to resolve the problem presented.

The first step is a brief examination of the doctrine of abstention from its origin in *Railroad Commission of Texas v. Pullman Co.*, 312 *U.S.*, 496, through the implementation of that doctrine in numerous decisions by this Honorable Court. *City of Meridian v. Southern Bell Tel. & Tel.*, 358 *U.S.*, 639, (1959); *Shipman v. DuPre*, 339 *U.S.*, 321 (1950); *Spector Motor Service v. McLaughlin*, 323 *U.S.*, 101 (1944); *and City of Chicago v. Fieldcrest Dairies, Inc.*, 316 *U.S.*, 168 (1942).

Through this cited line of cases this Court has broadened the principle of abstention so that it is applied not only when a state court construction might avoid a constitutional question, but also when the exercise of jurisdiction would result in unnecessary friction by enjoining state officers

from executing state policy entailing matters of purely local concern. *Alabama Public Service Commission v. Southern Railroad Co.*, 341 *U.S.*, 341 (1951). Further developing abstention through the comity principle, this Court has upheld a postponement of jurisdiction to avoid interference with a state's administrative process, (*Burford v. Sun Oil Co.*, 319 *U.S.* 315, (1943) and to avoid colliding with the state's right to collect taxes, *Toomer v. Witsell*, 334 *U.S.* 385, 392 (1948).

The proper functioning and operation of our federal system is dependent upon a delicate balance between the state governments and the national government. The doctrine of judicial abstention, based on mutual respect and on comity, upholds that balance.

The wisdom behind the policy of abstention is questioned neither by appellant nor by appellee. Appellant only claims that the facts of this case do not require abstention. This leads us to step two.

Step two requires a close analysis of the instant fact situation to determine whether abstention was properly applied. If the rationale of the *Harrison* case, *supra*, is to be employed, then abstention is proper if the statutes involved do leave reasonable room for a state court construction "which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem. *Harrison v. N.A.A.C.P.*, *supra, at page* 177.

The first statutes involved in this case are Sections 53-2121 and 53-2120 of the Tennessee Code Annotated, relating to the Division of Hotel and Restaurant Inspection, Department of Conservation of State of Tennessee.

Appellant has stated in its brief (at Page 14) that the constitutionality of these sections is not questioned by anyone in this case. At page 15 of its brief, Appellant considers the above statutes and decides "restaurant segregation is clearly not mandatory". While Appellant asserts that its construction is correct, nevertheless, it is not its interpretation, but the rulings of the Supreme Court of Tennessee which bind Appellees. The history of judicial interpretation of legislative action demonstrates that the legislative intent is not deduced by a cursory glance.

Appellant, citing Regulation R-18 (L), notes that the regulation provides that "Restaurants catering to both white and negro patrons *should* . . ." be segregated. (Emphasis supplied). Then, Appellant points out that under Regulation R-1 "shall" is mandatory and "should" merely indicates *desirability*. (Emphasis suppplied) This leads Appellant to conclude that "restaurant segregation is clearly not mandatory. (Appellant's brief, p. 15.)

Appellant fails to add emphasis to the word "*shall*" in the *second* sentence of Regulation No. R-18 (L). This sentence says "Segregation will be considered proper where each race *shall* have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Emphasis added.)" Is the second sentence mere surplusage added by the legislature? Appellee does not know how the Tennessee Supreme Court would interpret the regulations in question. As the distinguished three judge court below realized, the answer lies in requiring Appellant to go to the Tennessee Courts and find out.

The other statute involved in this case is Tennessee Code Annotated Section 62-710 which abrogated the common law rule giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement. This statute, like the others involved in this case, has never been authoritatively construed by the Tennessee Courts. Appellant again states that there are only two possible interpretations, and again concludes that no interpretation by the Tennessee Courts would avert the constitutional issue. (Appellant's brief, p. 17.) Perhaps Appellant is too hasty in stating that there are only two possible constructions to this statute. According to Appellant, the Tennessee Court will either say that this statute "furnishes Dobbs Houses the legal foundation for discrimination against Negroes", or that this statute does not apply to restaurants. Rarely is the task of interpreting legislation so simple. Again with deference to the Tennessee Courts and again only hazarding a possible, yet entirely reasonable, interpretation, the statute could be qualified by the equal protection clause of the Fourteenth Amendment. That is, the Court could hold that purely private operators of restaurants may discriminate against whomsoever they choose under the statute. However, operators in a class such as Dobbs House, insofar as the State is held to be a joint participant, may avail themselves of the statute as long as they do not discriminate against persons solely on the basis of color in violation of the Fourteenth Amendment. (*Burton v. Wilmington Parking Authority*, 365 *U.S.*, 715, 1916). This would certainly avert a constitutional de-

cision by this Honorable Court and prevent the needless friction involved in a Federal preemption of the State Court prerogative of construing its own statutes.

There is yet a further reason for abstention to be applied in this case. Assuming *arguendo* that this Honorable Court adopts the position urged by Appellant, an injunction will issue requiring Dobbs House not to discriminate against Negroes, and yet, since Appellant contends that the "statutes involved" are not involved, this Honorable Court could be requiring the violation of State law. In Tennessee, a law is presumed constitutional until it is found unconstitutional and officials are thereby bound.

Under the laws of Tennessee, a declaratory judgment statute[2] is available to the Appellant through which he may assert his grievance. The natural result of this procedure would permit the State of Tennessee an opportunity to determine the constitutionality of its own laws. This would be a procedure that is in keeping with the dignity that should be afforded any State of our Federal Union, and is, by the same token consistent with the decisions of the Supreme Court. It is not unreasonable to assume the State of Tennessee will fulfill its duty in construing these laws in the light of state and federal constitutional requirements. It is submitted that the Supreme Court of Tennessee has no inclination to shirk its duty toward this Supreme Court or its interpretation of the Constitution of the United States. In Roy v. Brittain, 201 Tenn., 140, it was held that under the supremacy clause of Article VI of the Constitution of the United States, the Tennessee Supreme Court was bound by the holding of United States Supreme

[2] Tenn. Code Ann., Vol V, Sec. 23-1101, et seq.

Court in the case of *Brown v. Board of Education of Topeka*, 347 *U.S.*, 483 (1954), and that the segregation of races in the field of public education under the separate but equal doctrine deprived persons so segregated of the equal protection of the laws guaranteed under this Amendment.

Finally, Appellant expresses concern over the alleged abdication of jurisdiction by the principle of abstention. Of course, it is elementary that, in abstaining, jurisdiction is not surrendered, but held in abeyance. As this Honorable Court stated in *Martin v. Creasy*, 360 *U.S.*, 219 (1959), at page 225, after abstaining from a construction of Pennsylvania law, which had not been interpreted by the Pennsylvania Court: "This is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property.' If, after all is said and done in the Pennsylvania Courts, any of the plaintiffs believe that the Commonwealth of Pennsylvania has deprived them of their property without due process of law, *this Court will be here.*" (Emphasis supplied)

Appellee prays that the Tennessee Courts be given the same chance as the Pennsylvania Courts. This Court may advise Appellant that should Appellant's grievance not be redressed by the Tennessee Courts, that this Honorable Court will still have jurisdiction.

CONCLUSION

It is respectfully submitted to this Honorable Court that the decision of the lower Court be affirmed and the appeal dismissed.

FRANK B. GIANOTTI, JR.
JAMES M. MANIRE
Memphis, Tennessee

Attorneys for Appellee

DAVID L. SIMPSON

of Counsel

CERTIFICATE OF SERVICE

I, Frank B. Gianotti, Jr., attorney herein and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon counsel of record for the Appellant a copy of the foregoing Brief of Appellee, City of Memphis, by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on _____, addressed as follows:

R. B. Sugarmon, Jr.
588 Vance Avenue
Memphis, Tennessee

Constance Baker Motley
10 Columbus Circle
New York 19, N. Y.

Frank B. Gianotti, Jr.,
Attorney for Appellee

Office Supreme Court, U.S.
FILED
JAN
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 84

JESSE TURNER,

Appellant,

vs.

CITY OF MEMPHIS, a Municipal Corporation Chartered under the Laws of the State of Tennessee, and DOBBS HOUSES, INC., a Corporation Organized and Existing under the Laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc., Restaurant in Memphis Municipal Airport,

Appellees.

BRIEF ON BEHALF OF DOBBS HOUSES, INC. AND W. S. HAVERFIELD, APPELLEES

EDWARD P. A. SMITH,
Commerce Title Building,
Memphis 3, Tennessee,

Attorney for Appellees, Dobbs Houses, Inc., and W. S. Haverfield.

Of Counsel:

JOHN M. HEISKELL,
WILLIAM V. ALEXANDER, JR.
MONTEDONICO, BOONE, GILLILAND,
HEISKELL & LOCH,
Commerce Title Building,
Memphis, Tennessee

INDEX

PAGE

Preface 1

Appellees' Position 1

Argument 2

Conclusion 3

CASES CITED

Claybrook v. State, 164 Tenn. 440, 443 (1932)..... 3

Harrison v. N.A.A.C.P., 360 U. S. 167, 79 S. Ct., 1025 (1959)..... 3

STATE REGULATION CITED

Tenn. Dept. of Conservation, Division of Hotel and Restaurant Inspection (Approved June 18, 1952 filed in Office of Secretary of State).
Regulation No. R-18(L)..... 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 84

JESSE TURNER,
Appellant,

vs.

CITY OF MEMPHIS, a Municipal Corporation Chartered under the Laws of the State of Tennessee, and DOBBS HOUSES, INC., a Corporation Organized and Existing under the Laws of the State of Tennessee, and W. S. HAVERFIELD, Manager of the Dobbs Houses, Inc., Restaurant in Memphis Municipal Airport,
Appellees.

BRIEF ON BEHALF OF DOBBS HOUSES, INC. AND W. S. HAVERFIELD, APPELLEES

PREFACE

The positions of Dobbs Houses, Inc. and its manager, W. S. Haverfield, have been stated in the Motion to Dismiss Appeal filed on their behalf in this Court in this case and will not be duplicated in this brief.

APPELLEES' POSITION

The doctrine of abstention was correctly applied below and should be sustained.

ARGUMENT

Everything else aside, Dobbs Houses, Inc. is faced with the proposition that it operates the restaurant at Memphis Municipal Airport under a lease with the City of Memphis which requires that no part of the leased premises shall be used for any purpose in violation of the laws of Tennessee. (Record, pp. 8 to 17, at p. 14.)

Admittedly, (appellant's brief, pp. 2-3), it is a violation of the criminal statutes of Tennessee for a restaurant operator to fail to comply with rules and regulations made by the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee (Tennessee Code Annotated, Sections 53-2120 and 53-2121), and that there is in existence in Tennessee a regulation made by that agency under statutory authority, No. R-18(L), which provides:

> "Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises."

This regulation has not been before the Tennessee Courts for construction, nor has its constitutionality been there challenged.

Appellant argues that the regulation is ambiguous and does not require segregation of the races in restaurants. (Appellant's brief, p. 15.)

However, the City of Memphis has construed the regulation as mandatory and as requiring segregation of races in the restaurant operated by Dobbs Houses, Inc. at Memphis Municipal Airport. (Answer of City of Memphis, Third Defense, R. p. 7.)

The regulation may, as contended by appellant, be unconstitutional, but, under the law of Tennessee, it is deemed valid and enforceable until declared invalid by a Court of competent jurisdiction.

Claybrook v. State, (1932) 164 Tenn. 440, 443.

Dobbs Houses, Inc., if it should accept appellant's contention and desegregate its restaurant, would subject itself (1) to arrest and prosecution under state law each time it served a negro citizen, and (2) to a forfeiture or attempted forfeiture of its lease with the City of Memphis. Such action would involve a multiplicity of actions and an unnecessary harassment of this appellee.

Under these facts and circumstances *Harrison v. N.A.A.C.P.* (1959), 360 U. S. 167, is applicable and the doctrine of abstention as applied by the Court below (R. pp. 87-89) is appropriate to the protection and preservation of the rights of all the parties.

CONCLUSION

It is, therefore, prayed that this appeal be dismissed, or deferred until such time as the Courts of Tennessee have been afforded an opportunity to construe, interpret and pass on the validity of the state laws and regulations hereinbefore set forth.

Respectfully submitted,

EDWARD P. A. SMITH,
Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Appellees, Dobbs Houses, Inc., and W. S. Haverfield.

Of Counsel:

JOHN M. HEISKELL,
WILLIAM V. ALEXANDER, JR.
MONTEDONICO, BOONE, GILLILAND,
HEISKELL & LOCH,
Commerce Title Building,
Memphis, Tennessee